

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

ROBOCAST,)
)
-----Plaintiff,)
) Case No.
vs.) 22-CV-305-RGA-
) JLH
)
NETFLIX,)
)
-----Defendant.)

ROBOCAST,)
)
-----Plaintiff,)
) Case No.
vs.) 22-CV-354-RGA-
) JLH
)
GOOGLE,)
)
-----Defendant.)

TRANSCRIPT OF DISCOVERY CONFERENCE

DISCOVERY CONFERENCE had before the
Honorable Jennifer L. Hall, U.S.M.J., via
teleconference on the 29th of August, 2023.

APPEARANCES

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-and-

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Counsel for Google

1 THE COURT: Good afternoon, everyone.
2 This is Jen Hall. We're on the line today to
3 hear a number of discovery disputes. We have
4 *Robocast versus Netflix*. It's 22-305. We also
5 have *Robocast versus Google*. It's 22-354.
6 Let's put appearances on the record starting
7 with Robocast

8 MR. GOLDEN: Thank you, Your Honor.
9 Good afternoon. This is Ronald Golden from
10 Bayard PA on behalf of Robocast. I have with
11 me on the line from McKool Smith Casey
12 Shomaker, William Ellerman, and Samuel Moore.

13 THE COURT: Great. Good afternoon to
14 all of you.

15 And how about Netflix?

16 MS. FARNAN: Yes, good afternoon,
17 Your Honor. This is Kelly Farnan from
18 Richards, Layton, and Finger on behalf of
19 Netflix. Tyler Cragg from my office is also on
20 the line. I'm joined by my co-counsel at
21 Latham and Watkins Tara Elliott, Rachel Cohen,
22 and Kimberly Li. We also have Laura Carrington
23 from Netflix on the line, and Ms. Cohen will
24 address the disputes before the Court today.

25 THE COURT: All right. Very good.

1 And how about in 22-304, Google?

2 DFT TWO: Good afternoon, Your Honor.
3 Fred Cottrell from Richards Layton for YouTube
4 and Google in 22-304. Also from my office,
5 Griffin Schoenbaum. And my co-counsel from
6 Wilson Sonsini, Jordan Jaffe, and Mr. Jaffe
7 will be speaking on behalf of the defendants.

8 THE COURT: Great. That's fine. We
9 have a court reporter on the line today.

10 I can tell you we've taken a look at the
11 letters, and as we did so, we were reminded
12 that we've already talked about some of these
13 issues once this summer. Doesn't seem like
14 we've made much progress since then, so let's
15 see what we can get done today.

16 Let's start with the defendants'
17 disputes. I've read the letters. Anything
18 that Netflix wants to add to its argument about
19 the interrogatories?

20 MS. COHEN: Hi, Your Honor. This is
21 Rachel Cohen on behalf of Latham and Watkins
22 for the defendant Netflix.

23 Just in terms of the first issue in
24 dispute for Defendant Netflix and Google, it
25 applies to them as well, in terms of the

1 numerosity dispute, Defendants -- Robocast, the
2 plaintiff in this case, doesn't actually defend
3 its counting at all in its responsive letter.
4 The interrogatories at issue here were served
5 on March 1st of this year. It's been six
6 months, and they have not responded to a single
7 substantive -- a single substantive response to
8 any of the served interrogatories. They do not
9 defend the numerosity issue.

10 And the served interrogatories are
11 consistent with the interrogatories that are
12 served in this court that are commonly before
13 the court, and to the extent -- I'm happy to
14 engage into why each one goes to the topical
15 issue and seeks the facts and circumstances
16 that go to the call of the question, if the
17 Court would like, but it is consistent with
18 practice that is consistent in this court, and
19 I think Robocast unfortunately invites the
20 court to start deviating from the practice, and
21 doing so would certainly increase the number of
22 discovery disputes in this jurisdiction.

23 THE COURT: Okay. And anything that
24 YouTube and Google want to add just about the
25 interrogatory number issue?

1 MR. JAFFE: Thank you, Your Honor.
2 This is Jordan Jaffe on behalf of Google and
3 YouTube. I won't repeat what Ms. Cohen
4 mentioned, so I'll be brief.

5 We agree, as to Google and YouTube, that
6 Robocast did not defend its counting in its
7 responsive brief, so in our view the easiest
8 way to resolve this dispute would be simply to
9 overrule the numerosity objections because none
10 of them have the discrete subparts, so we're
11 substantially under the limit.

12 We think if you look at the *Megatives*
13 case -- hopefully I'm pronouncing that
14 correctly -- Judge Burke lays out an example
15 where Defendants in Interrogatory 2 describe
16 "the development efforts that relate to the
17 alleged technologies" and goes through and has
18 them talking about the first described in
19 writing, first manufactured. And as Judge
20 Burke explained in that case, those were each
21 subsumed within the larger interrogatory and
22 are not discrete subparts.

23 For all those reasons, we believe the
24 subpart issue for Google and YouTube that they
25 all are -- do not comprise discrete and

1 separate subparts that are then subsumed within
2 the single one. That's part one.

3 And then part two, the numerosity
4 objection, I think that Ms. Cohen mentioned
5 we -- the better course for them would be to
6 answer at least the 25 interrogatories rather
7 than refuse to answer them all, and we've got
8 the caselaw in our brief, and I'm happy to
9 address it if the Court would like.

10 THE COURT: All right. Let's hear
11 from Robocast on this.

12 MS. SHOMAKER: Yes, Your Honor.
13 Casey Shomaker for Plaintiff Robocast.

14 Robocast believes in the letters that we
15 exchanged with Netflix over the past couple
16 months and in addition our briefing submitted
17 in front of this Court that we've cited the
18 caselaw that supports our position that these
19 'rogs comprise multiple subparts.

20 As noted in our briefing, we offered
21 compromise positions to both Google and Netflix
22 wherein Google and Netflix could withdraw the
23 objectionable interrogatories and thereby
24 Robocast would comply with the law back on
25 point in response to those interrogatories

1 without waiving numerosity objections. This
2 was reiterated multiple times, and neither
3 party took us up on it, and so we were forced
4 to comply with the law and not waive our
5 objections, so that's truly why we haven't
6 responded to any of the interrogatories.

7 THE COURT: Are you wanting me to
8 find that these are more than 25 that you were
9 served? Because you didn't even argue how
10 that's the case.

11 MS. SHOMAKER: Yes, Your Honor. So
12 these are multiple -- both Google and Netflix
13 served multiple interrogatories, more than 25
14 interrogatories. With respect to Google,
15 Google served -- exceeded the 25-interrogatory
16 limit when they served Interrogatory Number 12,
17 and so the -- our responses to interrogatories
18 1 through 11 were pending when they served
19 their final interrogatory; therefore, there
20 were more than 25 pending interrogatories at
21 the time. And Netflix only served one set of
22 interrogatories, and each one in that entire
23 set included more than 25 interrogatories and,
24 in fact, 45 discrete subparts.

25 THE COURT: Okay. We've got a lot to

1 get through today, so I'll keep my ruling
2 brief.

3 I disagree with how Robocast has handled
4 this, both in terms of how it responded to the
5 parties and particularly with respect to its
6 position against Google, who even Robocast
7 agrees did not serve more than 25
8 interrogatories.

9 How long have these interrogatories been
10 pending?

11 MS. SHOMAKER: Six months for
12 Netflix. Nearly six months. September 1st
13 will be six months, Your Honor.

14 THE COURT: Okay. And then just,
15 again, a third thing of the reasons I disagree
16 with how Robocast handled this was in its
17 briefing to this Court, there's no attempt made
18 to even provide the Court with how it counted
19 or why it's appropriate, basically putting the
20 burden on the Court to expend time and
21 resources.

22 So Robocast needs to respond to all of
23 the interrogatories within one week to both
24 parties. These have been pending a long time.
25 You should know what the answers are. I don't

1 think I have anything more to say on that.

2 Netflix has a couple other issues.

3 MS. COHEN: This is Rachel Cohen
4 again for Netflix. The second issue is
5 Robocast's deficient Rule 26(a) disclosures as
6 it relates to damages.

7 So as the plaintiff in this case,
8 Robocast has an obligation under Rule 26,
9 consistent with Judge Andrews' decisions in the
10 *NexStep* case as well as the *Conflow* case, to
11 identify -- it respectfully requires initial
12 computation and disclosure of the evidence that
13 Robocast will rely upon, to the full extent
14 that it can or should know of it.

15 We were happy to see that for the first
16 time after months of going round and round on
17 their good-faith basis for asserting lost
18 profits that they finally acknowledged to the
19 Court that it can't or won't pursue lost
20 profits in this case, and that's a start, but
21 it really doesn't solve the disclosure of what
22 they actually do intend to seek in terms of a
23 reasonable royalty.

24 The -- under the Court's the prior law
25 that I just cited to, they do have an

1 obligation to explain what they can and do
2 know, and those include, Your Honor, among
3 other things, an explanation of how the
4 licenses directed to the patents-in-suit -- at
5 least one has been previously licensed -- how
6 do those three licenses play into their damages
7 theories in this case, their terms of the
8 license, the duration, the licensing package of
9 the patentee. That's *Georgia Pacific* factor
10 number four.

11 *Georgia Pacific* factor number five talks
12 about the relationship between the patentee and
13 accused infringer. Notwithstanding our efforts
14 for the last six months to get discovery from
15 Robocast, they refused to identify any of that
16 information, which was squarely in their
17 possession. They know if they have a competing
18 product or patent infringing product. They
19 know if the parties are competitors. That's
20 information that they possess and that, under
21 Rule 26, they have an obligation to disclose
22 and they've been withholding.

23 They also have attempted to shift the
24 burden to seek discovery from Netflix before it
25 can disclose information that's solely in its

1 possession, and that's wrong based on the law
2 we obviously cite to in our papers.

3 THE COURT: All right. Let me hear
4 from Robocast.

5 So you agree, don't you, that you need to
6 update your Rule 26 disclosures immediately,
7 given the fact that you have now said that you
8 are not seeking lost profits, do you not?

9 MR. ELLERMAN: Your Honor, this is
10 Will Ellerman for Robocast. We have already
11 done that. We have already updated our Rule 26
12 disclosures to clarify we are not seeking lost
13 profits.

14 THE COURT: I don't have the current
15 version of the disclosures in front of me?

16 MR. ELLERMAN: No, Your Honor.

17 THE COURT: When were those updated?

18 MR. ELLERMAN: Sometime last week
19 before the briefing on this.

20 THE COURT: So how am I supposed to
21 determine whether or not your current
22 disclosures are good enough if I don't have
23 them?

24 MR. ELLERMAN: Well, Your Honor, I
25 believe Netflix included the -- at least one

1 version of the disclosures in their letter
2 since this was their issue, and what we did was
3 delete the reference to lost profits. And so
4 our disclosures, as they stand today, seek
5 reasonable royalty damages. We have complied
6 with Rule 26 to the best of our ability in that
7 regard.

8 The *NexStep* case that Netflix cites, you
9 know, that case is, number one, distinguishable
10 because that struck a new damages theory that
11 was disclosed for the first time on the eve of
12 trial, and the case says that all a claimant
13 has to do, its only obligation, is to disclose
14 information about its damages to the best of
15 its ability. And Netflix has not given any
16 reason or any authority that would require
17 Robocast to give a damages calculation at a
18 time when Netflix has given us virtually no
19 financial discovery whatsoever.

20 And as we cited in our papers, Your
21 Honor, the advisory committee notes to this
22 rule cite a patent case as the example of when
23 a plaintiff is simply not able to provide a
24 complete damages disclosure at the outset of a
25 case because all relevant information is in the

1 defendant's possession. And we may be getting
2 a little bit ahead of ourselves into some of
3 the other issues here, but Netflix's production
4 to date is woefully inadequate.

5 THE COURT: I'm going to stop you
6 right there. I'm looking right now at Exhibit
7 G to Netflix's letter. And so what you're
8 saying is you deleted out the paragraph on page
9 six that talks about lost profits, but you
10 still have in there the reasonable royalty
11 paragraph that says that the analysis you're
12 going to use is the hypothetical negotiation
13 and that you've got licenses with Microsoft and
14 Apple and that you're also going to look at
15 licenses produced by Netflix, and you're going
16 to come up with a royalty rate. Is that
17 essentially what it says?

18 MR. ELLERMAN: That's correct, Your
19 Honor, and we've --

20 THE COURT: Okay. So under the
21 circumstances here, I'm going to hold that
22 that's good enough for now, given that you
23 dropped your lost profits. But again, the
24 issue as it was presented to me was that you
25 were seeking lost profits. You didn't drop

1 that until after they raised it, and I would
2 have agreed with them that this wasn't enough,
3 that you were seeking it to sue lost profits,
4 and it shouldn't have taken a discovery motion
5 to get this resolved.

6 Let's move on to the next issue that
7 Netflix has.

8 MS. COHEN: Thank you, Your Honor.

9 The third issue that we raised is
10 Robocast's limitations on its document
11 production. Throughout its submissions, and it
12 sounds like this is where it's going again in
13 this hearing, Robocast has represented it
14 produced more than a million documents in this
15 litigation. But it also acknowledges that
16 those documents were merely a reproduction
17 reproducing and reusing all of its submissions
18 and exchanges from the Microsoft and Apple
19 litigation, which both resolved in 2014. It
20 admitted that it does not intend to produce any
21 documents after 2014, and, obviously, the
22 relevant damages window that it has alleged in
23 this case is 2016 to 2020, and it has indicated
24 to us that it has no intention of producing any
25 documents in that window.

1 Although it argues that the materials are
2 not relevant or somehow they believe there's no
3 relevance to those documents, we pointed out
4 repeatedly setting aside the lost profits,
5 which we just discussed they dropped, those
6 documents are also relevant to the hypothetical
7 negotiation and the *Georgia Pacific* factors.
8 Of course, the Federal Circuit has explained
9 that the *Book of Wisdom* allows the parties in
10 the hypothetical negotiation to take a look
11 beyond the date of the hypothetical negotiation
12 itself to inform those discussions.

13 And whether they have a practicing
14 product, which they refuse to tell us, whether
15 they have a product that is within the scope of
16 the claims, whether the parties competed, all
17 of that information is highly relevant, both at
18 the time of the hypothetical negotiation and in
19 the window of the alleged damages of 2016 to
20 2020. And those are highly relevant both in
21 terms of damages as well as claim scope,
22 liability, and infringement, as well as
23 invalidity in this case. We do believe we have
24 shown they're relevant.

25 In terms of the burden, they said they're

1 standing on the fact they say it's unduly
2 burdensome to even look for those documents
3 because they might be privileged. We take
4 issue with that as well, Your Honor, and that
5 gets into the second issue or second part of
6 the dispute, which is documents relating to
7 funding and financing, which is a component but
8 not the sole dispute that relates to the
9 untenable position they've taken in this case.

10 As it relates to the funding and
11 financing issue, it's Robocast that took the
12 position before this Court just last year that
13 litigation is a big piece of Robocast's
14 business and raising capital to finance its
15 litigation efforts is part of its business
16 strategy. That is consistent, Your Honor, not
17 only with its opposition to its motion to
18 transfer in the Google case, but it's also
19 consistent with their production to date. If
20 they look back at their pre-2014 production,
21 those do show that they produced documents in
22 the prior litigation relating to their
23 licensing and enforcement efforts, and that
24 undermines their assertion here that those
25 documents are somehow privileged and unduly

1 burdensome to so log.

2 Of course, if they want to assert
3 privilege, they have the burden as the
4 plaintiff and the holder of the alleged
5 privilege to prove that those documents are
6 privileged by, at a minimum, logging those
7 documents, which we believe are highly relevant
8 to the case, and shouldn't bar them doing a
9 reasonable search for materials that are highly
10 relevant to this case, and they are on the
11 damages issues as well as liability.

12 THE COURT: All right. Thanks very
13 much. Let's turn it over to Robocast.

14 Let's focus right now, if we could, on
15 your production to them. You can make your
16 argument about why their production is
17 deficient in a second. Let's just focus on
18 what they want from you. What is your position
19 on documents post-dating 2014? That you don't
20 have any? That you don't have any that aren't
21 privileged? Or they're not relevant? What's
22 the exact position?

23 MR. ELLERMAN: Sure, Your Honor.
24 Will Ellerman again.

25 First of all, Robocast has produced over

1 a million documents. That's over 4 million
2 pages. 155,000-some-odd of those documents are
3 e-mails. The only justification that Netflix
4 has given for documents post-dating 2014 is
5 that it's somehow relevant to a hypothetical
6 negotiation. They have not explained how it
7 could possibly be relevant to a hypothetical
8 negotiation that would have occurred years
9 before 2014.

10 The hypothetical negotiation date in this
11 case predates the damages period, which is 2016
12 to 2020. It would have occurred way more than
13 six years ago. We don't know exactly when the
14 hypothetical negotiation occurred because
15 Netflix has not given us sufficient
16 documentation to pin that down. But my point
17 is to the extent they say it's relevant to the
18 hypothetical negotiation, we need to dig
19 further back in time than 2014 because it
20 appears, in all likelihood, that the playlist
21 feature that's accused was probably introduced
22 sometime in 2012 or earlier.

23 But, Your Honor, as far as what Robocast
24 has, there's nothing -- we -- first of all,
25 we -- Robocast has never taken the position

1 that it's not going to turn over a relevant
2 document that may have been created after 2014
3 that's somehow relevant to the time period in
4 this case. But the fact of the matter is
5 Robocast is not a big company --

6 THE COURT: That's exactly the
7 opposite of what they say. You have not taken
8 the position that you won't turn over documents
9 after 2014?

10 MR. ELLERMAN: We have taken the
11 position that it's unduly burdensome for us to
12 sort through all of the privileged documents
13 that exist during this time period in order to
14 try to find anything that might be marginally
15 relevant.

16 Robocast is basically a two-man operation
17 that's largely a holding company today. It's
18 had no commercial activity since 2014 aside
19 from the patent licenses that have been
20 produced. It's had no other litigations since
21 the Microsoft and the Apple cases concluded.
22 So if it has anything at all, it's either going
23 to be a massive volume of privileged
24 information, and there may be documents related
25 to potential litigation funding.

1 Our point is even if there was some
2 minuscule bit of relevant information during
3 this time period, it would be outweighed by the
4 burden of having to log virtually every
5 communication as privileged.

6 THE COURT: Okay. I've heard enough
7 on this dispute. I take your point. I don't
8 know if "ironic" is the right word, but I can't
9 find on this record that it would be burdensome
10 for Robocast, as the party who's bringing this
11 suit, to produce documents. So here's what you
12 need to do. You need to -- if the parties can
13 agree on how a privilege log should be
14 exchanged and they don't require
15 document-by-document logging, that's fine. I
16 don't know what you all have agreed on.

17 But Robocast needs to search for
18 documents that post-date 2014 that are
19 responsive to the request for production made
20 by the defendant, and if those documents are
21 responsive, they need to be produced. If
22 they're responsive but they're privileged, they
23 need to be logged.

24 Are there any such documents -- this
25 question is for counsel for Plaintiff -- that

1 are -- here's what I'm trying to get at: Do I
2 need to discuss this litigation funding issue,
3 or are you going to claim that those are all
4 privileged so we really don't need to talk
5 about whether litigation funding documents are
6 relevant?

7 MR. ELLERMAN: Our primary objection,
8 Your Honor, on the litigation funding documents
9 is that they are not relevant under the
10 authority of this Court. We've cited the Court
11 to a couple of cases from Judge Andrews where
12 he says funding-related documents are not
13 relevant. Producing them gives the defendant
14 an unfair advantage.

15 Netflix has cited to cases that don't
16 apply here. One case sought production of an
17 IP insurance policy. That's not a funding
18 document. And other Courts in the district
19 have said that the one case that Netflix relies
20 on, *Acceleration Bay*, does not stand for the
21 proposition that funding documents are
22 relevant, are always relevant. What it stands
23 for is that, really, any document might be
24 relevant as long as the party seeking it can
25 establish its relevance.

1 And here, in none of the briefing that
2 Netflix has submitted to this Court has it even
3 tried to explain how potential funding
4 documents might be relevant to any particular
5 fact in this case at all. It just says, well,
6 some Courts in the district require disclosure
7 of funding information; therefore, Robocast
8 must do that as well. And that's not the law
9 in the district. That's not what the cases
10 they cited to say, and we don't believe that
11 there's been any showing here whatsoever of
12 relevance for any funding documents.

13 So we would ask -- we understand the
14 Court's ruling about post-2014 documents, but
15 we would ask that the Court carve out any
16 funding documents from that order.

17 THE COURT: Here's what my ruling is
18 on this: I wouldn't say that I'm carving out
19 anything. If there's a document that is
20 responsive to one of Defendants' other requests
21 but it also talks about litigation funding,
22 that document is not going to be carved out.
23 That document needs to be logged. I'm not
24 going to order that litigation funding
25 documents need to be produced at this point,

1 but I'm also not carving them out from
2 Plaintiff's obligation to log privileged
3 communications.

4 Let me hear from Netflix. Is that ruling
5 clear? Is there anything else you want to
6 raise?

7 MS. COHEN: Your Honor, I think that
8 covers it.

9 THE COURT: Okay. Thank you very
10 much.

11 All right. And Google and YouTube, that
12 covers yours as well; is that right?

13 MS. COHEN: Your Honor, sorry. This
14 is Rachel Cohen. Just to be clear, the
15 obligation is on Robocast to log its documents
16 that are responsive even if they cover
17 litigation funding, and that is consistent with
18 its representation to the Court that its
19 business is licensing funding, and that goes to
20 issues such as valuation and invalidity. And,
21 you know, we do cite multiple cases, including
22 from Judge Andrews, that discuss the relevance
23 of these documents. We want to make sure they
24 are properly logged, and if they contend that
25 they happen to be privileged, that we can have

1 a record to be able to come back to the Court
2 if we disagree with their privilege claims.
3 Otherwise, we run the risk of coming back here
4 just to ask for documents that they withheld as
5 what they contend irrelevant without our
6 ability to challenge that.

7 THE COURT: Right. I have said that
8 if a document is responsive both to a request
9 that asks for documents pertaining to
10 litigation funding as well as another request
11 that pertains to something else -- I'm sure
12 that you have plenty of them that also cover
13 the litigation funding documents -- that that
14 needs to be logged. If it solely has to do
15 with funding and it's not responsive to
16 anything else, they don't have to log it. It's
17 hard for me to imagine that there would be a
18 document that would fall into that category.

19 MS. COHEN: Thank you.

20 THE COURT: All right. Let's move on
21 to Robocast's letter.

22 I'm a little bit challenged here.
23 Actually, "little bit" is an understatement.
24 I'm a lot challenged here with respect to
25 Robocast's letter because it's asking me to

1 make some orders about production, and I don't
2 have in front of me any of Robocast's discovery
3 requests as required by the local rule. Can
4 you show me where those are in the record?

5 MR. ELLERMAN: Your Honor, I don't
6 know that we included the specific RFPs in the
7 record, but the issues are global, so they're
8 not something that we need to parse through
9 individual requests to discuss.

10 THE COURT: And I would appreciate
11 that position more if I felt like we hadn't
12 already been here exactly on this issue and I
13 asked you all to parse through and discuss
14 exactly why certain requests needed e-mail
15 discovery.

16 MR. ELLERMAN: That's what we have
17 been -- we've been completely unable to do
18 that, Your Honor, and we understood and
19 appreciated the Court's statements at the last
20 conference where you told the parties to
21 exchange ESI custodians, have a discussion with
22 those custodians about what they have and what
23 might be in their e-mail, and then have a
24 meaningful discussion with the other side and
25 explain what they have. We've been willing to

1 do that from Robocast's standpoint, but the
2 problem we have is although Netflix has
3 disclosed ESI custodians, it has also in the
4 same breath said we're not going to produce any
5 e-mails to you no matter what.

6 So having that discussion with that
7 predetermined outcome of they're not going to
8 give us e-mails no matter what we say, no
9 matter what we point to, no matter what we
10 argue, is not productive, so what we've
11 requested is that the Court order Netflix that
12 it's going to have to engage in this process
13 with the idea that at the end of the process,
14 when it's concluded, it's going to have to
15 produce some scope of e-mails. And we just
16 can't break past that barrier with Netflix.

17 THE COURT: Did you get a list of ten
18 custodians from Netflix? Is that part of the
19 issue?

20 MR. ELLERMAN: Well, we previously
21 got three custodians only on technical topics.
22 We went back and forth and round and round,
23 asked for more. We told them what topics we
24 wanted them on. Last night -- or I'm sorry.
25 Not last night. Friday, this past Friday, when

1 the briefing was due, they disclosed two
2 additional ESI custodians, a corporate
3 controller and a marketing and operations
4 director. We had also asked for custodians on
5 licensing and research and development. We
6 haven't gotten those yet. We don't know if we
7 will. But in answer to your question, we've
8 gotten five custodians.

9 THE COURT: Let me turn it to
10 Netflix.

11 Did you not read the default rule to
12 identify at least ten? And you can make the
13 argument why you don't need to produce the
14 custodians, but you need to at least give the
15 other side ten.

16 MS. COHEN: Hi, Your Honor. Again,
17 this is Rachel Cohen for Netflix.

18 Your Honor, based on the June 2nd
19 teleconference, we understood that the parties
20 would have some flexibility to the default to
21 disclose custodians who have the most relevant
22 information and also discuss where the
23 documents are actually located as it relates to
24 the facts and issues in the case, and that's
25 exactly what we have sought to do here.

1 And we have disclosed now a total of
2 five, and we certainly would like to continue
3 to have a meaningful discussion with Robocast
4 about what they do and don't have. And as
5 we've repeatedly explained to them and as they
6 have not acknowledged during the
7 meet-and-confer process, that many of the
8 documents they seek, including sales and
9 financials and licensing and source code, are
10 materials that are actually located in
11 noncustodial data sources.

12 The other issue, Your Honor, is we asked
13 to have a meaningful discussion as it relates
14 to all the ESI, and to date, they've only
15 disclosed two ESI custodians. And, you know,
16 it's just less than a year ago they represented
17 to the Court that they had four employees in
18 opposing the transfer motion for Google and
19 that documents would be coming from those
20 individuals that were located on the East
21 Coast, and they've been unwilling to speak with
22 us about those.

23 So we've been happy to have a meaningful
24 discussion, but this case -- we believe, as it
25 relates to Robocast -- to Netflix, rather, the

1 number of custodians disclosed should be
2 tailored to the claims and the issues that are
3 presented here. These claims that they've
4 acknowledged date back from over ten years.
5 They elected not to pursue their claims when
6 they had other litigations going. Because the
7 cases failed, there's a very limited damages
8 window, and it relates to just direct
9 infringement claims. And that's one of the
10 primary reasons why a lot of the documents we
11 expect and have been producing are in
12 noncustodial and not custodial data sources.

13 THE COURT: I understand your
14 position on that. Here's what I'll say about
15 the number of custodians issue: I don't think
16 that my comments during the June teleconference
17 were unclear, and I'm looking here at page 31.
18 It says the parties can, if they haven't
19 already, exchange the names of ten custodians
20 just so both sides can see it, but this doesn't
21 necessarily mean that you have to search the
22 e-mail for all custodians.

23 So I know later that I talked about it
24 could be less, but I think read in context,
25 that more had to do with a party that might not

1 have ten employees. So everybody needs --
2 everybody with more than ten employees needs to
3 have ten, and maybe you can put on there that
4 this person is unlikely to have any information
5 in their custodial files, but you can't say, I
6 don't think, with a straight face that they
7 don't have any e-mails that are relevant. They
8 might be very marginally relevant, but you have
9 to produce them. But you need to put them on
10 the list, and the local rule -- not the local
11 rule. The default standard says it should go
12 from the most likely to least likely, but let
13 me turn to Robocast.

14 Have you given them two people? Why
15 haven't you given four, given that it sounds
16 like you had more than two employees at least
17 at some point in time that's relevant to this
18 dispute?

19 MR. ELLERMAN: We -- Your Honor, my
20 understanding is we only have two employees,
21 and we provided those two employees as our ESI
22 custodians. And on top of that, we've already
23 produced 155,000 e-mails in this case.

24 THE COURT: Okay. I understand that.
25 Did you have any more than two employees during

1 any period of time that you're asking for
2 damages for?

3 MR. ELLERMAN: I will have to go back
4 and double check that, Your Honor. If that was
5 the case, we can address that.

6 THE COURT: All right. So put them
7 all on your list. Okay. So that's the number
8 of custodians issue.

9 With respect to e-mail discovery, I need
10 to understand a little bit more about where
11 we're at in the case. So I understand that
12 we've still got documents being produced that
13 are not e-mail documents. I understand that
14 the deadline for substantial completion of
15 document production isn't until November. I
16 also understand that we didn't get document
17 requests from Robocast for four months after
18 the scheduling order was entered. I understand
19 all of these things.

20 The thing that I need to know is, putting
21 aside e-mail discovery, when do Netflix and
22 YouTube and Google think they're going to be in
23 a position to produce what they need to produce
24 in this case, putting the e-mail discovery
25 aside?

1 And the reason why I'm asking is this:
2 Because I could be amenable to saying you don't
3 have to do e-mail discovery right now, but I
4 want to try to keep this case on the schedule,
5 so I need to know when you can produce the rest
6 of the stuff.

7 Go ahead.

8 MR. JAFFE: Your Honor, this is
9 Jordan Jaffe on behalf of Google and YouTube.

10 With regard to the e-mail discovery and
11 the RFP issues, our situation is this: They
12 did not propound any RFPs until May 15, 2023,
13 and those were, ballpark, 56. And they were
14 largely duplicative and related to damages
15 issues.

16 We responded to those RFPs and have been
17 meeting and conferring with them about those
18 RFPs, and they have identified no specific
19 deficiency in our document production regarding
20 those RFPs. They make blanket statements about
21 the number of documents we produced, but they
22 don't identify any specific RFP where we have
23 not produced sufficient documents. We also
24 have produced source code and made that
25 available for inspection as well. So that's

1 number one.

2 And then --

3 THE COURT: Just to make sure, your
4 point of view is that you produced everything
5 that they've requested?

6 MR. JAFFE: No, not everything. We
7 are rolling production, but they haven't
8 identified anything that's deficient. They
9 haven't identified anything where we haven't
10 produced something, where we haven't produced
11 noncustodial ESI information, and therefore, we
12 need to go to e-mail.

13 That goes to point two, which is we met
14 and conferred with them on their only
15 outstanding RFPs, and we said we don't think
16 e-mail makes sense for these. And they haven't
17 come back with any specifics for the RFPs that
18 gives us guidance.

19 And at least our understanding, in
20 thinking about the prior teleconference with
21 Your Honor, was let's not do this in the
22 abstract. Let's talk about specific requests
23 you have and whether e-mail was appropriate,
24 and that's exactly what we've done on behalf of
25 Google and YouTube, is gone to them and said

1 these RFPs don't make sense.

2 But just to be clear, we, on behalf of
3 Google and YouTube, are not saying no e-mail
4 discovery, period. At least as of now, our
5 proposal is that it's phased, and specifically
6 what we proposed is the parties talk to each
7 other after the substantial completion of
8 document production deadline and identify any
9 issues where they think e-mail would be
10 necessary and proportional to the needs of the
11 case, and at that time, if there are any
12 remaining disputes, we bring them to the Court,
13 but that we do this in phases, where if there's
14 a sufficient production of noncustodial
15 information, that we don't need to go into
16 e-mail, as opposed to Robocast's position,
17 which is just this blanket position not even
18 tethered to any specific request for
19 production.

20 The last thing I'll mention before we
21 move on, which is in our letter brief, and this
22 is ECF 103 at Footnote 3, we noted the only
23 allegations of indirect and willful
24 infringement as to Google are for one of the
25 three patents-in-suit, which is the '451

1 patent, and to the extent that those claims are
2 dismissed, we don't believe that Robocast has
3 made any showing that e-mail is appropriate,
4 and we directed -- we cited our prior motion to
5 dismiss on this point, and Judge Andrews, in
6 denying the motion to dismiss as to the '451
7 patent, he permitted us leave to refile upon a
8 Federal Circuit order, which is the *In Re:*
9 *Sellix* case.

10 That happened to come out yesterday, so
11 we are analyzing that decision, and we plan to
12 refile a motion to dismiss to dismiss the '451
13 patent. If and when that happens, we don't
14 think e-mail discovery will be appropriate at
15 all for Google and YouTube, given the lack of
16 indirect and willful infringement in the cases.
17 And that's an additional reason why we think
18 phasing is appropriate, because it will allow
19 that motion to play out, and we may not need to
20 get into e-mail discovery on those issues. It
21 will give us time to have our motion be
22 briefed.

23 THE COURT: Going back to my
24 question, I think the answer was in there, and
25 the answer is that you're going to be able to

1 be prepared to have completed your rolling
2 production of responses, non-e-mail documents,
3 by November and not earlier, and that we've
4 still got plenty of time between November and
5 the close of fact discovery in April to both
6 worry about the e-mails and get all the
7 depositions taken. Is that fair to say?

8 MR. JAFFE: On behalf of Google and
9 YouTube, that's fair, Your Honor.

10 THE COURT: All right. Okay. Let me
11 hear from Robocast why Google's proposal is not
12 good enough for you.

13 MR. ELLERMAN: Sure, Your Honor.

14 First of all, I want to make clear that
15 we don't have a dispute teed up with Google
16 between Robocast and Google on the sufficiency
17 or not of their document production. We're
18 taking them at their word that they're going to
19 roll more substantial production out between
20 now and November.

21 That being said, we also don't have a
22 dispute, in my mind, with Google about whether
23 we're going to engage in e-mail discovery.
24 They have not said we are not producing
25 e-mails, so it's a different issue than the one

1 presented with Netflix.

2 But we do see a problem with the idea of
3 a phased e-mail discovery process because the
4 deadline for substantial completion of document
5 discovery is November 17th. Under Google's
6 proposal, we would wait until, I guess, around
7 the first of the year to either have an
8 agreement on the scope of e-mail discovery or
9 come back to the Court and get an order on the
10 scope of e-mail discovery, and then we've got a
11 discovery deadline in April. So that would
12 give us just a few very short months to
13 complete discovery and conduct depositions, and
14 we would need the e-mail discovery to be
15 completed before we start taking depositions in
16 this case.

17 So our fear is we're just going to get --
18 we're going to be in a situation where there
19 are large dumps of documents on or near the
20 substantial completion deadline in November.
21 Then we've got to sort out, after the holidays,
22 all the issues with e-mail discovery and figure
23 out what the scope of that is going to be, get
24 the e-mails produced, and then there's
25 virtually no time left to do discovery and take

1 all the depositions we need to take. We think
2 if there's going to be a phasing-in of e-mail
3 discovery, that process really needs to start
4 now, Your Honor.

5 THE COURT: Isn't part of issue here
6 that we lost four months due to the fact that
7 you hadn't served requests until the summer?

8 MR. ELLERMAN: Well, I don't know. I
9 mean, we served our requests, and there's been
10 time to respond to those requests and start
11 producing documents. We've not received much
12 in the way of documents at all from Google to
13 date. It's even worse from Netflix. We can
14 talk about that in our next issue, but, you
15 know, what I'm afraid is happening here is that
16 no matter when document requests are served --
17 and to be clear, we have served document
18 requests on issues unrelated to damages. We
19 served technical requests as well.

20 We -- Google and Netflix keep reiterating
21 that their source code is available for review.
22 The fact of the matter is we were not able to
23 schedule source code review until right now
24 because the protective order wasn't entered
25 until last week. So, you know, what I'm afraid

1 is happening here is that parties, defendants,
2 are just going to wait until closer to the
3 November deadline and see that as a deadline
4 when they need to produce documents instead of
5 when document requests are due, which is
6 30 days after the requests are served.

7 THE COURT: I've got it.

8 All right. One more question for Google,
9 and this is really what I was trying to get at
10 with my first question, which is given that
11 you're not producing e-mails right now, under
12 your proposal, you say you don't need to, is
13 there a reason why we can't get the document
14 production substantially complete before
15 November 17th such that we can build in a
16 little more time? I may be more likely to
17 adopt your proposal if we had a little more
18 time built in. Do you understand what I'm
19 asking?

20 MR. JAFFE: Yes, Your Honor, and let
21 me address one item briefly about that.
22 Counsel for Robocast mentioned their technical
23 RFPs. Those are not actually due until, I
24 think, a week from tomorrow. It's not the case
25 that there's this broad outstanding set of

1 discovery.

2 With regard to the existing RFPs, the
3 ones that they propounded in May, I don't see a
4 reason why we couldn't substantially produce
5 completion to those before the deadline. That
6 should be no problem.

7 But as they propound more and the parties
8 need to meet-and-confer on their scope and
9 whether they're appropriate, we can't really
10 commit on this record to doing that when we
11 don't even know what the RFPs are and what that
12 universe is.

13 THE COURT: That's fair. When do you
14 think, with respect to these documents that
15 have already been requested, it's the end of
16 August now, when do you think you'll be in a
17 position to have those mostly produced?

18 MR. JAFFE: We just served
19 supplemental RFP responses to a number of those
20 RFPs, I want to say within the last week, and
21 so the next step there for us is meeting and
22 conferring with them to see if there's any sort
23 of specific areas that they have issues with
24 our supplemental responses on those issues.

25 Again, I'm hesitant to give a specific

1 time, but let me just kind of overarching --
2 our understanding is we produced substantially
3 the documents that comply with those RFPs based
4 on our current responses, and so it would be
5 kind of meeting and conferring with them on
6 additional documents that they believe are
7 appropriate in response to those RFPs.

8 THE COURT: I think I understand what
9 you're saying. Okay.

10 With respect to the e-mail discovery
11 issue, I think that Google's proposal is
12 appropriate, and it's the proposal that the
13 Court is going to adopt here with the
14 understanding that there's not -- this is not a
15 situation where Google is holding back
16 documents to dump on November 17th. What I'm
17 hearing is they're getting produced as they get
18 identified and that outstanding documents are
19 the ones that the parties are working through
20 with respect to what's appropriate in their
21 meet-and-confers.

22 So okay. I'm just getting all my
23 discovery letters organized here.

24 All right. Let's talk about Netflix.
25 Does Google's proposal sound okay to Netflix as

1 well?

2 MS. COHEN: So again, this is Rachel
3 Cohen for Netflix.

4 Your Honor, while I appreciate that
5 Google may be in the same situation in a few
6 months down the road if and when the '451
7 patent drops out of the case, we are in
8 substantially different footing at the present
9 time because the Court has already dismissed
10 the indirect and willful infringement claims
11 against Netflix. The only claims in this case
12 are direct infringement. Courts have found
13 that where there are only direct infringement
14 claims, the damages window is limited, as it is
15 in this case, and the patents have long
16 expired, that e-mail discovery is not relevant.
17 And Robocast's letter failed to identify a
18 single substantive reason associated with its
19 document requests that justifies e-mail
20 discovery from Netflix. So at this juncture,
21 we don't think any discovery -- e-mail
22 discovery from Netflix is warranted, and we
23 have not argued any specific reason it is to
24 this Court.

25 THE COURT: I understand counsel's

1 point on that.

2 So the way that it's presented to me is
3 the same dispute I think that I heard already
4 in June. And again, I'm going to deny requests
5 for e-mail discovery at this point because of
6 the unique circumstances pointed out by
7 Netflix, but I'm not going to say that this is
8 something that can't be raised by Robocast
9 later on when they've identified a reason why
10 the e-mails are relevant, and I think the best
11 way to do that is to do it along with Google's
12 proposal as to the timing.

13 Let me just make sure for the record that
14 I understand from Netflix where they are in
15 terms of their document production. Go ahead.

16 MS. COHEN: So as it relates to
17 technical RFPs, they were only served last
18 week, so we are reviewing them and providing
19 our -- we will provide timely responses and
20 objections, and we will confirm the responsive
21 information. So I want to make sure the record
22 is clear those only just were served, so we're
23 meeting our obligations, of course, for those
24 and the prior ones.

25 The prior requests, as the Court has

1 already acknowledged, they were served four
2 months after the ability to serve opening
3 requests. They are limited to the issue of
4 damages. We have been -- we timely served our
5 responses and objections, and we've been
6 rolling out production. The last three weeks
7 alone, we made a production each week where I
8 think nearly 4,000 documents have been produced
9 relating to issues of Netflix's licenses, its
10 revenue information, what drives and does not
11 drive demand for Netflix, which is,
12 unsurprisingly, not related to the issues
13 products, rather its award-winning content. So
14 we have been actively producing documents
15 related to the damages requests that were
16 served two months ago, and we will continue to
17 do so.

18 I think we're similarly situated to
19 Google with respect to the fact that we
20 certainly have every intent to produce our
21 responsive documents sufficiently in connection
22 with the schedule and the substantial
23 completion deadline for the ones that have been
24 served to date.

25 And in terms of the source code, I do

1 want to make clear that the source code, which
2 is the primary source of relevant information
3 for whether or not the accused functionality
4 infringes, has been available since April.
5 Robocast has not reviewed it, and contrary to
6 their representations that it relates to
7 Netflix in particular, we said they could come
8 look at the code consistent with the default
9 for source code, and they have declined to do
10 so.

11 THE COURT: Okay. Thank you.

12 Go ahead, counsel.

13 MR. ELLERMAN: This is Will Ellerman.
14 May I respond to that?

15 THE COURT: Sure.

16 MR. ELLERMAN: First of all, let me
17 address the source code. I touched on this.
18 We couldn't very well go review source code
19 because we had no provision worked out about
20 the source code manifest and, basically, the
21 table of contents of the source code and how
22 that was going to be handled. We didn't get
23 that sorted out with Netflix and Google until
24 last week. So looking at source code before
25 last week would have been looking for a needle

1 in a haystack. It would have been a fruitless
2 endeavor. We understand that the code has been
3 made available, but we've been severely
4 restricted in our ability to view it until now.

5 I want to give Your Honor just a sense of
6 what we have received to date from Netflix.
7 Taking out their prior art production, we've
8 gotten 60 documents totalling around 2,000
9 pages before late last night, when we got a
10 document production of a bunch of public SEC
11 filings for Netflix. That's what it appears to
12 be. We haven't had time to review it all yet.
13 But to date, what they have produced in this
14 case is 12 core technical documents, a bunch of
15 prior art documents, public SEC filings, public
16 news articles, and screenshots from their own
17 website and some licensing agreements.

18 We're concerned about this. This is why
19 we've asked Netflix for a schedule repeatedly.
20 We've asked them when are you going to
21 substantially produce documents. They refused
22 to tell us. They refused to tell us the last
23 time we met-and-conferred a week and a half
24 ago, and then we got a dump last night of
25 public documents.

1 Your Honor, the most frustrating thing
2 about this, I think we heard it on the call
3 today, is that Netflix says the bulk of its
4 documents is going to come from non-custodial
5 data sources. Netflix knows that, so it
6 obviously knows what documents it has. It
7 knows where those documents are. It has not
8 produced them, and it will not tell us when
9 it's going to produce them.

10 So we're concerned that we're going to
11 get up until November 17th and then we're
12 finally going to start getting documents and
13 then we're going to have to look and see what's
14 missing at that point and come back to the
15 Court and start this all over again after the
16 substantial completion of document discovery is
17 over, and that's going to jam us up on getting
18 discovery done, getting depositions done,
19 sorting out issues of e-mail discovery, and
20 everything else.

21 THE COURT: Understood. Understood.
22 Let me switch it to Netflix.

23 Do you disagree with his characterization
24 about what's been produced to date? Have you
25 gone through and collected, for example,

1 financial documents that were requested from a
2 non-custodial status source and produced that,
3 and when do you expect that to be close to
4 done?

5 MS. COHEN: Your Honor, we completely
6 disagree with the representations of Robocast's
7 counsel.

8 Just to level set at the very beginning,
9 first of all, these requests were served in
10 June. Our responses were due in July, and
11 we've been producing since August. So we
12 produced nearly 4,000 documents responsive to
13 their requests, and they've produced zero
14 documents. No documents. No e-mails from
15 their possession other than the documents that
16 they reproduced from the Microsoft and Apple
17 cases.

18 So it's really interesting that they're
19 taking issue with our production, which even
20 though there was a four-month lag from the time
21 we served our requests on March 1st of this
22 year and they served their first request in
23 June, we produced nearly 4,000 documents more
24 than they have in the relevant window. So it's
25 really unfortunate where we are today, and they

1 have not identified a single RFP to you or to
2 us where they contend we haven't given
3 responsive information for which they are
4 seeking that we need to produce.

5 We are actively reviewing their requests,
6 and we told them -- we gave them proper
7 responses and objections and told them what
8 we're producing and where we need clarification
9 so we can meet our obligations.

10 And we told them we're producing on a
11 rolling basis, which is exactly what we've
12 done. It seems like they're complaining we
13 produced documents last week and this week, but
14 that's exactly what we told them we would do,
15 consistent with the schedule and consistent
16 with our conduct in this case, which is to,
17 obviously, comply with our obligations and pull
18 the relevant material. And that includes
19 revenue information, licensing information, and
20 how our products work.

21 THE COURT: Understood. All right.
22 We've got all that on the record now. That's
23 helpful.

24 So I will again reiterate my ruling from
25 before, that we're not going to order any

1 e-mail discovery at this time, but I will just
2 remind everybody on the phone that that doesn't
3 mean that we're going to hold everything until
4 the substantial completion deadline. Everyone
5 needs to keep moving.

6 And I will also say this: And I get it,
7 that it's enticing to compare the burdens on
8 your clients versus the burdens on the other
9 side, and it seems to be a theme in this case,
10 and certainly Defendants are trying to paint a
11 picture for the Court that perhaps Plaintiffs
12 aren't so much interested in obtaining
13 discovery as much as they are interested in
14 causing Defendants to incur costs, and that's
15 the picture that Defendants are trying to
16 paint.

17 It seems to be going on on both sides,
18 and I understand that that may be the economics
19 of the situation in this case, but keep in mind
20 that the Court is actually needing to decide
21 what amount of discovery is proportional to the
22 needs of the case in accordance with the law,
23 so that needs to be microcomputed and I'm doing
24 the best I can on this limited record.

25 So let's turn to Robocast's next request

1 against Netflix, which it seems like we just
2 resolved, which has to do with the volume of
3 documents. We discussed that on the record,
4 and now we've got Robocast's request for an
5 order compelling Netflix to produce responsive
6 documents from outside the damages period.

7 MR. ELLERMAN: Yes, Your Honor. Will
8 Ellerman.

9 THE COURT: -- and I'll hear what
10 Netflix's position is.

11 MR. ELLERMAN: So Netflix has refused
12 to produce any documents across the board from
13 outside the damages period, which is roughly
14 from 2016 to 2020. Google says that it will
15 produce documents preceding the damages period
16 but only for prior art and comparable licenses.
17 Netflix says no documents whatsoever. It's not
18 going to do it.

19 And we acknowledge the six-year lookback
20 on discovery imposed by the Court's default
21 order, but we also point out that that
22 provision could be modified upon a showing of
23 good cause, and here, we absolutely have good
24 cause. We have necessary cause, and that's
25 because of the unique situation of this case.

1 Documents predating the damages period are
2 extremely relevant because the hypothetical
3 negotiation predates the damages period.

4 The hypothetical negotiation, as the
5 Court knows, is the date of first infringement,
6 and we cited the Court to authority that that
7 date can be outside the damages period. The
8 oldest patent-in-suit here was issued in 2006,
9 and Netflix's and Google's playlist features
10 were introduced before 2016, which is the
11 beginning of the damages period.

12 We don't know exactly when that
13 hypothetical negotiation date is. It's
14 sometime in there. We hope to find that out
15 during discovery, but it's not just the date
16 that we need. It's all of the relevant facts
17 surrounding that date that the parties would
18 have had knowledge of when they sat down at the
19 hypothetical negotiating table. I will quote
20 here in the Federal Circuit in the later
21 *Dynamics* case where it said, "In considering
22 the 15 *Georgia-Pacific* factors, it is presumed
23 that the parties had full knowledge of the
24 facts and circumstances surrounding the
25 infringement at that time," at the time of the

1 hypothetical negotiation.

2 So what Netflix and Google are putting
3 Robocast in a position of is potentially having
4 an expert, a damages expert, trying to give an
5 opinion about a hypothetical negotiation
6 completely in the dark with no information from
7 the defendant about the accused functionality
8 during that time period and all of the facts
9 surrounding the *Georgia Pacific* factors during
10 that time period. So for Netflix and Google to
11 say that we get no information that predates
12 2016 severely hamstrings our ability to
13 calculate a reasonable royalty in this case.

14 THE COURT: Okay. So the issue that
15 I'm having here is you're saying you want all
16 documents responsive that are prior to 2016,
17 and they're saying you should have no documents
18 prior to that date because you haven't
19 articulated what the relevance is. Isn't it
20 right that what I should do is order them to
21 produce -- to go back and produce some
22 documents to the extent that they're relevant
23 to an issue that you just talked about, but not
24 respond to every single document you request
25 going back before 2016; right?

1 MR. ELLERMAN: Well, as Your Honor --
2 Your Honor, as they -- as Netflix and Google
3 have both pointed out, the RFP set that we
4 served first was financial discovery, so all of
5 that goes to damages and the hypothetical
6 negotiation.

7 THE COURT: Okay. Here's what I'm
8 going to say: I understand your point. I'm
9 not going to say that your request is denied,
10 but I'm not going to grant it at this point.
11 And the reason why is I don't have your
12 request. I have no basis to say what's
13 appropriate to go back or whether there's good
14 cause to go back. So pick the requests you
15 want to have some discovery, and those -- and
16 you should be able to explain to them why you
17 need documents outside of 2016.

18 I disagree that documents from 2016 are
19 never going to be -- prior to 2016 are never
20 going to be relevant, but I don't understand
21 that to be what Netflix was saying. Netflix
22 was saying you've got to say what you want and
23 articulate the basis for why you need it, and I
24 agree with them on that. You can reraise with
25 the Court. I need to have your requests.

1 MR. ELLERMAN: Your Honor, may I
2 clarify a couple of things?

3 THE COURT: Yes.

4 MR. ELLERMAN: First of all, it has
5 been very clear from Netflix that this is not a
6 request-by-request issue, it's an
7 across-the-board issue, but I understand the
8 Court's ruling.

9 I do want to point out one thing, though,
10 and that there are likely documents from before
11 and after the damages period that reflect
12 information from within the damages period, and
13 Netflix and Google shouldn't be able to draw an
14 arbitrary line that they're only going to
15 produce documents that were created during the
16 damages period. There could be documents
17 predating the damages period that contain
18 information like financial forecasts for the
19 damages period or documents after the period
20 that contain historical data about historical
21 revenues and things like that. I don't think
22 this bright line distinction of we're only
23 giving you things created during the damages
24 period is ever appropriate.

25 THE COURT: All right. Thanks for

1 that. I just said it wasn't, and that's how
2 we're going to move forward. So talk with them
3 about what things you want from prior to 2016,
4 and we'll talk about what the burden is, and
5 we'll decide if you have good cause to get it.
6 Right now, I can't rule on this.

7 So your request to compel, to the extent
8 it's a request to compel, is going to be denied
9 at this point. But they understand from
10 listening to what I said today that they need
11 to work with you a little bit on this.

12 All right. What do we have left?
13 Anything else that you want from Netflix?

14 MR. ELLERMAN: I believe that is all
15 of Robocast's issues, Your Honor.

16 THE COURT: Okay. And anything that
17 you want from Google?

18 MR. JAFFE: Your Honor, this is
19 Jordan Jaffe. I think we covered all the
20 issues for Google, and the last one on our list
21 was the time period issue.

22 If I may add just one item on that, we
23 didn't see any argument from them that
24 information after the expiration date was
25 relevant. They didn't make any arguments about

1 that in their brief, and so we understand that
2 issue to be undisputed. But we take Your
3 Honor's ruling that they can articulate the
4 request, and we'll deal with it at that time.

5 THE COURT: Okay. Great. I think
6 that makes a ton of sense, and it's very
7 reasonable.

8 All right. Anything else anybody else
9 wants to say before we call it a day?

10 All right. Great. Everyone take care.
11 Bye-bye.

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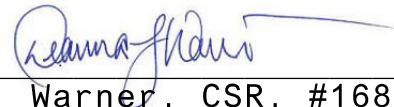
C E R T I F I C A T E

STATE OF DELAWARE)
) ss:
COUNTY OF NEW CASTLE)

I, Deanna L. Warner, a Certified Shorthand Reporter, do hereby certify that as such Certified Shorthand Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in Case Number 22-CV-305-RGA-JLH, *ROBOCAST* vs. *NETFLIX*, heard on August 29, 2023.

I further certify that a transcript of my shorthand notes was typed and that the foregoing transcript, consisting of 59 typewritten pages, is a true copy of said **DISCOVERY CONFERENCE**.

SIGNED, OFFICIALLY SEALED, and FILED with the Clerk of the District Court, NEW CASTLE County, Delaware, this 3rd day of September, 2023.



Deanna L. Warner, CSR, #1687
Speedbudget Enterprises, LLC

#	26 [5] - 10:8, 11:21, 12:6, 12:11, 13:6	activity [1] - 20:17	36:12, 36:16, 41:6, 42:4, 42:9, 42:17, 55:8, 56:19	37:2, 37:14, 37:17
#1687 [1] - 59:21	26(a) [1] - 10:5	add [3] - 4:18, 5:24, 57:17	April [3] - 37:3, 38:9, 45:25	beyond [1] - 16:11
'	29 [1] - 59:10	addition [1] - 7:16	arbitrary [1] - 56:9	big [2] - 17:13, 20:5
'451 [4] - 35:23, 36:4, 36:10, 43:3	29th [1] - 1:20	additional [3] - 28:2, 36:15, 42:3	areas [1] - 41:20	bit [6] - 14:2, 21:2, 25:21, 25:22, 32:9, 57:6
'rogs [1] - 7:19	2nd [1] - 28:17	address [5] - 3:24, 7:8, 32:4, 40:18, 46:13	argue [2] - 8:9, 27:10	blanket [2] - 33:19, 35:15
1	3	admitted [1] - 15:19	argued [1] - 43:19	board [2] - 52:7, 56:2
1 [1] - 8:18	3 [1] - 35:20	adopt [2] - 40:14, 42:10	argues [1] - 16:1	book [1] - 16:9
103 [1] - 35:20	30 [1] - 40:4	advantage [1] - 22:14	argument [4] - 4:18, 18:16, 28:12, 57:18	break [1] - 27:16
11 [1] - 8:18	31 [1] - 30:16	advisory [1] - 13:21	arguments [1] - 57:20	breath [1] - 27:4
12 [2] - 8:16, 47:10	3rd [1] - 59:18	afraid [2] - 39:13, 39:23	art [3] - 47:3, 47:11, 52:11	brief [6] - 6:4, 6:7, 7:8, 9:2, 35:19, 57:21
15 [2] - 33:11, 53:17	4	afternoon [5] - 3:1, 3:9, 3:13, 3:16, 4:2	articles [1] - 47:12	briefed [1] - 36:20
155,000 [1] - 31:22	4 [1] - 19:1	ago [4] - 19:13, 29:15, 45:12, 47:20	articulate [2] - 55:18, 57:23	briefing [6] - 7:16, 7:20, 9:17, 12:19, 23:1, 28:1
155,000-some-odd [1] - 19:2	4,000 [3] - 45:4, 49:8, 49:18	agree [4] - 6:5, 12:5, 21:13, 55:19	articulated [1] - 54:14	briefly [1] - 40:18
17th [4] - 38:3, 40:13, 42:13, 48:7	45 [1] - 8:24	agreed [2] - 15:2, 21:16	aside [4] - 16:4, 20:18, 32:20, 32:24	bright [1] - 56:17
1st [3] - 5:5, 9:12, 49:16	5	agreement [1] - 38:6	assert [1] - 18:2	bring [1] - 35:11
2	56 [1] - 33:12	agreements [1] - 47:13	asserting [1] - 10:17	bringing [1] - 21:10
2 [1] - 6:15	59 [1] - 59:13	agrees [1] - 9:7	assertion [1] - 17:24	broad [1] - 40:22
2,000 [1] - 47:4	6	ahead [4] - 14:2, 33:6, 44:11, 46:8	associated [1] - 43:15	build [1] - 40:13
2006 [1] - 53:3	60 [1] - 47:4	allegations [1] - 35:21	attempt [1] - 9:17	built [1] - 40:16
2012 [1] - 19:22	A	alleged [4] - 6:17, 15:22, 16:19, 18:4	attempted [1] - 11:23	bulk [1] - 47:24
2014 [10] - 15:19, 15:20, 18:19, 19:4, 19:9, 19:19, 20:2, 20:9, 20:18, 21:18	ability [6] - 13:6, 13:15, 25:6, 44:23, 46:25, 54:7	allow [1] - 36:16	August [4] - 1:20, 41:13, 49:7, 59:10	bunch [2] - 47:6, 47:10
2016 [12] - 15:22, 16:20, 19:11, 52:9, 53:5, 54:7, 54:11, 54:20, 55:12, 55:13, 55:14, 56:23	able [6] - 13:23, 25:1, 36:23, 39:20, 55:11, 56:8	allows [1] - 16:9	authority [3] - 13:16, 22:10, 53:1	burden [6] - 9:20, 11:24, 16:25, 18:3, 21:4, 56:24
2020 [4] - 15:23, 16:20, 19:12, 52:9	absolutely [1] - 52:18	alone [1] - 45:3	available [4] - 33:24, 39:19, 45:25, 46:24	burdens [2] - 51:2, 51:3
2023 [4] - 1:20, 33:11, 59:10, 59:19	abstract [1] - 34:21	amenable [1] - 33:1	award [1] - 45:9	burdensome [4] - 17:2, 18:1, 20:11, 21:9
22-304 [2] - 4:1, 4:4	acceleration [1] - 22:20	amount [1] - 51:16	award-winning [1] - 45:9	Burke [2] - 6:14, 6:20
22-305 [1] - 3:4	accordance [1] - 51:17	analysis [1] - 14:11	B	business [3] - 17:14, 17:15, 24:19
22-354 [1] - 3:5	accused [4] - 11:13, 19:21, 45:24, 54:2	analyzing [1] - 36:9	ballpark [1] - 33:12	BY [3] - 2:2, 2:16, 2:19
22-CV-305-RGA [1] - 1:5	acknowledge [1] - 52:14	AND [1] - 1:2	bar [1] - 18:8	bye [2] - 58:6
22-CV-305-RGA-JLH [1] - 59:9	acknowledged [4] - 10:18, 29:5, 30:3, 44:22	Andrews [3] - 22:11, 24:22, 36:3	barrier [1] - 27:16	bye-bye [1] - 58:6
22-CV-354-RGA [1] - 1:11	acknowledges [1] - 15:15	Andrews' [1] - 10:9	based [3] - 12:1, 28:17, 41:25	C
25 [6] - 7:6, 8:8, 8:13, 8:20, 8:23, 9:7	across-the-board [1] - 56:2	answer [5] - 7:5, 7:7, 28:7, 36:22, 36:23	basis [4] - 10:17, 50:6, 55:7, 55:18	calculate [1] - 54:8
25-interrogatory [1] - 8:15	actively [2] - 45:10, 49:25	answers [1] - 9:24	bay [1] - 22:20	calculation [1] - 13:17
		appearances [1] - 3:6	Bayard [1] - 3:10	capital [1] - 17:14
		APPEARANCES [1] - 2:1	BAYARD [1] - 2:2	care [1] - 58:5
		apple [4] - 14:14, 15:18, 20:20, 49:12	beginning [2] - 49:4, 53:6	Carrington [1] - 3:22
		applies [1] - 4:24	behalf [9] - 3:10, 3:18, 4:7, 4:21, 6:2, 33:8, 34:23, 35:1, 37:6	carve [1] - 23:15
		apply [1] - 22:16	believes [1] - 7:14	carved [1] - 23:22
		appreciate [2] - 26:10, 43:1	best [4] - 13:6, 13:14, 44:6, 51:19	carving [2] - 23:18, 24:1
		appreciated [1] - 26:19	better [1] - 7:5	Case [3] - 1:5, 1:11, 59:8
		appropriate [11] - 9:19, 34:22, 36:1,	between [4] - 11:12,	case [47] - 5:2, 6:13, 6:20, 8:10, 10:7, 10:10, 10:20, 11:7,

13:8, 13:9, 13:12, 13:22, 13:25, 15:22, 16:23, 17:9, 17:18, 18:8, 18:10, 19:11, 20:4, 22:16, 22:19, 23:5, 28:23, 29:23, 31:22, 32:4, 32:10, 32:23, 33:3, 35:9, 36:7, 38:14, 40:21, 43:4, 43:8, 43:12, 47:10, 50:11, 51:4, 51:14, 51:17, 52:20, 53:16, 54:8 caselaw [2] - 7:8, 7:18 cases [8] - 20:20, 22:11, 22:15, 23:9, 24:21, 30:6, 36:14, 49:12 Casey [2] - 3:11, 7:13 CASEY [1] - 2:5 CASTLE [2] - 59:3, 59:18 category [1] - 25:18 causing [1] - 51:9 certain [1] - 26:14 certainly [4] - 5:21, 29:1, 45:16, 51:5 Certified [2] - 59:4, 59:6 certify [2] - 59:5, 59:11 challenge [1] - 25:6 challenged [2] - 25:22, 25:23 characterization [1] - 48:19 check [1] - 32:3 Circuit [3] - 16:8, 36:6, 53:15 circumstances [4] - 5:15, 14:21, 44:2, 53:19 cite [3] - 12:2, 13:22, 24:21 cited [8] - 7:17, 10:25, 13:20, 22:10, 22:15, 23:10, 36:2, 53:1 cites [1] - 13:8 claim [3] - 13:12, 16:22, 22:3 claims [10] - 16:16, 25:2, 30:1, 30:2, 30:4, 30:8, 35:24, 43:7, 43:8, 43:11 clarification [1] - 50:3 clarify [2] - 12:12, 55:22 clear [8] - 24:5, 24:14, 35:1, 37:12, 39:15, 44:18, 45:22, 55:25	Clerk [1] - 59:17 clients [1] - 51:3 close [2] - 37:3, 48:24 closer [1] - 39:25 co [2] - 3:20, 4:5 co-counsel [2] - 3:20, 4:5 coast [1] - 29:20 code [14] - 29:8, 33:23, 39:19, 39:21, 45:21, 45:22, 46:4, 46:5, 46:13, 46:14, 46:16, 46:17, 46:20, 46:23 Cohen [9] - 3:21, 3:23, 4:21, 6:3, 7:4, 10:3, 24:14, 28:16, 42:25 COHEN [11] - 2:12, 4:20, 10:3, 15:8, 24:7, 24:13, 25:19, 28:15, 42:24, 44:12, 49:1 collected [1] - 48:21 coming [2] - 25:3, 29:18 comments [1] - 30:15 commercial [1] - 20:17 commit [1] - 41:7 committee [1] - 13:21 commonly [1] - 5:12 communication [1] - 21:5 communications [1] - 24:3 company [2] - 20:5, 20:16 comparable [1] - 52:11 compare [1] - 51:2 compel [2] - 57:2, 57:3 compelling [1] - 51:25 competed [1] - 16:16 competing [1] - 11:17 competitors [1] - 11:19 complaining [1] - 50:7 complete [3] - 13:24, 38:11, 40:12 completed [2] - 36:24, 38:13 completely [3] - 26:17, 49:1, 54:1 completion [8] - 32:13, 35:6, 38:2, 38:18, 41:2, 45:19, 48:12, 50:24 complied [1] - 13:5 comply [4] - 7:24, 8:4,	41:25, 50:12 component [1] - 17:7 comprise [2] - 6:25, 7:19 compromise [1] - 7:21 computation [1] - 10:12 concerned [2] - 47:14, 48:6 concluded [2] - 20:21, 27:14 conduct [2] - 38:11, 50:11 confer [2] - 29:6, 41:5 conference [1] - 26:20 CONFERENCE [3] - 1:16, 1:18, 59:15 conferred [2] - 34:13, 47:19 conferring [3] - 33:16, 41:19, 42:2 confers [1] - 42:18 confirm [1] - 44:16 conflow [1] - 10:10 connection [1] - 45:17 considering [1] - 53:16 consistent [10] - 5:11, 5:17, 5:18, 10:9, 17:16, 17:19, 24:17, 46:4, 50:10 consisting [1] - 59:13 contain [2] - 56:12, 56:15 contend [3] - 24:24, 25:5, 49:22 content [1] - 45:9 contents [1] - 46:17 context [1] - 30:23 continue [2] - 29:1, 45:12 contrary [1] - 46:1 controller [1] - 28:3 copy [1] - 59:14 core [1] - 47:10 corporate [1] - 28:2 correct [1] - 14:18 correctly [1] - 6:14 costs [1] - 51:9 Cottrell [1] - 4:3 COTTRELL [1] - 2:16 counsel [8] - 2:7, 2:20, 3:20, 4:5, 21:25, 40:19, 46:8, 49:3 Counsel [1] - 2:14 counsel's [1] - 43:21 counted [1] - 9:19 counting [2] - 5:2, 6:6	COUNTY [1] - 59:3 County [1] - 59:18 couple [4] - 7:15, 10:2, 22:11, 55:22 course [4] - 7:5, 16:8, 18:2, 44:19 Court [32] - 3:24, 5:17, 5:18, 5:20, 7:9, 7:17, 9:17, 9:18, 9:20, 10:19, 17:12, 22:10, 23:2, 23:15, 24:18, 25:1, 27:11, 29:16, 35:11, 38:7, 42:10, 43:6, 43:20, 44:21, 48:11, 51:6, 51:15, 52:25, 53:1, 55:20, 59:17 COURT [48] - 1:1, 3:1, 3:13, 3:25, 4:8, 5:23, 7:10, 8:7, 8:25, 9:14, 12:3, 12:14, 12:17, 12:20, 14:5, 14:20, 18:12, 20:6, 21:6, 23:17, 24:9, 25:7, 25:20, 26:10, 27:17, 28:9, 30:12, 31:23, 32:5, 34:2, 36:21, 37:8, 39:3, 40:5, 41:10, 42:5, 43:21, 46:7, 46:11, 48:17, 50:16, 52:4, 54:9, 55:2, 55:23, 56:20, 57:11, 57:25 court [3] - 4:9, 5:12, 5:13 Court's [5] - 10:24, 23:14, 26:19, 52:15, 56:3 Courts [3] - 22:18, 23:6, 43:9 cover [2] - 24:16, 25:12 covered [1] - 57:14 covers [2] - 24:8, 24:12 Cragg [1] - 3:19 CRAGG [1] - 2:9 created [3] - 20:2, 56:10, 56:18 CSR [1] - 59:21 current [3] - 12:14, 12:21, 42:1 custodial [4] - 30:11, 31:4, 47:25, 48:23 custodians [17] - 26:21, 26:22, 27:3, 27:18, 27:21, 28:2, 28:4, 28:8, 28:13, 28:20, 29:14, 29:25, 30:14, 30:18, 30:21,	31:21, 32:7 D damages [34] - 10:6, 11:6, 13:5, 13:10, 13:14, 13:17, 13:24, 15:21, 16:20, 16:21, 18:11, 19:11, 30:6, 32:1, 33:13, 39:16, 43:11, 44:25, 45:11, 52:1, 52:8, 52:10, 52:21, 52:23, 53:2, 53:6, 53:24, 54:25, 56:6, 56:7, 56:11, 56:12, 56:14, 56:18 dark [1] - 54:1 data [4] - 29:10, 30:11, 48:1, 56:15 date [19] - 14:4, 16:11, 17:19, 19:10, 21:18, 29:13, 30:3, 39:11, 45:20, 47:2, 47:9, 48:20, 52:25, 53:2, 53:8, 53:10, 53:12, 54:13, 57:19 dating [2] - 18:19, 19:4 days [1] - 40:4 deadline [10] - 32:13, 35:7, 38:2, 38:9, 38:18, 40:1, 41:2, 45:19, 50:24 deal [1] - 57:24 Deanna [2] - 59:4, 59:21 decide [2] - 51:15, 56:25 decision [1] - 36:9 decisions [1] - 10:9 declined [1] - 46:5 default [5] - 28:10, 28:19, 31:10, 46:4, 52:15 defend [3] - 5:2, 5:9, 6:6 Defendant [2] - 1:8, 1:14 defendant [5] - 4:22, 4:23, 21:20, 22:13, 54:2 defendant's [3] - 4:16, 14:1, 23:20 defendants [7] - 4:7, 5:1, 6:15, 39:24, 51:5, 51:9, 51:10 deficiency [1] - 33:18 deficient [3] - 10:5, 18:17, 34:7
---	--	---	--	--

<p>Delaware ^[1] - 59:18</p> <p>DELAWARE ^[2] - 1:2, 59:2</p> <p>delete ^[1] - 13:3</p> <p>deleted ^[1] - 14:8</p> <p>demand ^[1] - 45:7</p> <p>denied ^[2] - 55:4, 57:3</p> <p>deny ^[1] - 43:25</p> <p>denying ^[1] - 36:4</p> <p>depositions ^[5] - 37:5, 38:11, 38:13, 38:24, 48:14</p> <p>describe ^[1] - 6:15</p> <p>described ^[1] - 6:18</p> <p>determine ^[1] - 12:21</p> <p>development ^[2] - 6:16, 28:5</p> <p>deviating ^[1] - 5:20</p> <p>DFT ^[1] - 4:2</p> <p>different ^[2] - 37:23, 43:5</p> <p>dig ^[1] - 19:18</p> <p>direct ^[3] - 30:7, 43:9, 43:10</p> <p>directed ^[2] - 11:4, 36:2</p> <p>director ^[1] - 28:4</p> <p>disagree ^[6] - 9:3, 9:15, 25:2, 48:19, 49:2, 55:13</p> <p>disclose ^[4] - 11:21, 11:25, 13:13, 28:20</p> <p>disclosed ^[6] - 13:11, 27:3, 28:1, 28:25, 29:14, 29:25</p> <p>disclosure ^[4] - 10:12, 10:21, 13:24, 23:6</p> <p>disclosures ^[7] - 10:5, 12:6, 12:12, 12:15, 12:22, 13:1, 13:4</p> <p>DISCOVERY ^[3] - 1:16, 1:18, 59:15</p> <p>discovery ^[46] - 3:3, 5:22, 11:14, 11:24, 13:19, 15:4, 26:2, 26:15, 32:8, 32:20, 32:23, 33:2, 33:9, 35:3, 36:12, 36:18, 37:3, 37:21, 38:1, 38:3, 38:6, 38:8, 38:9, 38:11, 38:12, 38:20, 38:23, 39:1, 40:23, 42:7, 42:20, 43:13, 43:16, 43:18, 44:1, 48:12, 48:14, 48:15, 50:21, 51:8, 51:16, 52:15, 53:10, 54:24, 55:10</p> <p>discreet ^[1] - 8:24</p> <p>discrete ^[3] - 6:10,</p>	<p>6:22, 6:25</p> <p>discuss ^[5] - 22:2, 24:22, 26:9, 26:13, 28:21</p> <p>discussed ^[2] - 16:5, 51:23</p> <p>discussion ^[6] - 26:21, 26:24, 27:6, 29:2, 29:12, 29:23</p> <p>discussions ^[1] - 16:12</p> <p>dismiss ^[4] - 36:3, 36:4, 36:10</p> <p>dismissed ^[2] - 35:25, 43:6</p> <p>dispute ^[10] - 4:23, 4:25, 6:8, 17:6, 17:8, 21:7, 31:17, 37:13, 37:20, 43:24</p> <p>disputes ^[5] - 3:3, 3:24, 4:17, 5:22, 35:10</p> <p>distinction ^[1] - 56:17</p> <p>distinguishable ^[1] - 13:9</p> <p>district ^[3] - 22:18, 23:6, 23:9</p> <p>District ^[1] - 59:17</p> <p>DISTRICT ^[2] - 1:1, 1:2</p> <p>document ^[26] - 15:10, 20:2, 21:15, 22:18, 22:23, 23:19, 23:22, 23:23, 25:8, 25:18, 32:14, 32:15, 33:18, 35:6, 37:15, 38:2, 39:14, 39:15, 40:3, 40:11, 43:15, 44:11, 47:6, 48:12, 54:19</p> <p>document-by-document ^[1] - 21:15</p> <p>documentation ^[1] - 19:16</p> <p>documents ^[89] - 15:14, 15:15, 15:20, 15:24, 16:3, 16:6, 17:3, 17:6, 17:21, 17:25, 18:5, 18:7, 18:19, 19:1, 19:2, 19:4, 20:8, 20:12, 20:24, 21:11, 21:18, 21:20, 21:24, 22:5, 22:8, 22:12, 22:21, 23:4, 23:12, 23:14, 23:16, 23:25, 24:15, 24:23, 25:4, 25:9, 25:13, 28:22, 29:7, 29:18, 30:9, 32:11, 32:12, 33:20, 33:22, 36:25, 38:17, 39:9,</p>	<p>39:10, 40:2, 41:11, 41:25, 42:3, 42:13, 42:15, 45:4, 45:10, 45:17, 47:4, 47:10, 47:11, 47:17, 47:21, 47:25, 48:2, 48:3, 48:8, 48:22, 49:8, 49:9, 49:10, 49:11, 49:18, 50:8, 51:23, 52:1, 52:7, 52:10, 52:12, 52:21, 54:11, 54:12, 54:17, 55:12, 55:13, 56:5, 56:10, 56:11, 56:14</p> <p>done ^[7] - 4:15, 12:11, 34:23, 48:14, 48:25, 50:7</p> <p>double ^[1] - 32:3</p> <p>down ^[3] - 19:16, 43:3, 53:13</p> <p>draw ^[1] - 56:8</p> <p>drive ^[1] - 45:7</p> <p>drives ^[1] - 45:6</p> <p>drop ^[1] - 14:25</p> <p>dropped ^[2] - 14:23, 16:5</p> <p>drops ^[1] - 43:4</p> <p>due ^[5] - 28:1, 39:4, 40:3, 40:20, 49:6</p> <p>dump ^[2] - 42:13, 47:20</p> <p>dumps ^[1] - 38:17</p> <p>uplicative ^[1] - 33:13</p> <p>duration ^[1] - 11:8</p> <p>during ^[10] - 20:13, 21:2, 29:5, 30:15, 31:24, 53:10, 54:3, 54:4, 56:10, 56:18</p> <p>dynamics ^[1] - 53:16</p>	<p>easiest ^[1] - 6:7</p> <p>East ^[1] - 29:19</p> <p>ECF ^[1] - 35:20</p> <p>economics ^[1] - 51:13</p> <p>efforts ^[4] - 6:16, 11:13, 17:15, 17:23</p> <p>either ^[2] - 20:22, 38:5</p> <p>elected ^[1] - 30:4</p> <p>Ellerman ^[5] - 3:12, 12:10, 18:24, 46:9, 52:3</p> <p>ELLERMAN ^[24] - 2:5, 12:9, 12:16, 12:18, 12:24, 14:18, 18:23, 20:10, 22:7, 26:5, 26:16, 27:20, 31:18, 32:2, 37:11, 39:6, 46:9, 46:12, 52:2, 52:6, 54:21, 55:21, 55:24, 57:9</p> <p>Elliott ^[1] - 3:21</p> <p>ELLIOTT ^[1] - 2:12</p> <p>employees ^[7] - 29:16, 30:25, 31:1, 31:15, 31:19, 31:20, 31:24</p> <p>end ^[2] - 27:13, 41:12</p> <p>endeavor ^[1] - 46:23</p> <p>enforcement ^[1] - 17:23</p> <p>engage ^[3] - 5:14, 27:12, 37:21</p> <p>entered ^[2] - 32:17, 39:22</p> <p>Enterprises ^[1] - 59:22</p> <p>enticing ^[1] - 51:2</p> <p>entire ^[1] - 8:22</p> <p>ESI ^[7] - 26:21, 27:3, 28:2, 29:13, 29:14, 31:20, 34:10</p> <p>ESQ ^[12] - 2:2, 2:5, 2:5, 2:6, 2:9, 2:9, 2:12, 2:12, 2:13, 2:16, 2:17, 2:19</p> <p>essentially ^[1] - 14:17</p> <p>establish ^[1] - 22:25</p> <p>eve ^[1] - 13:11</p> <p>evidence ^[1] - 10:12</p> <p>exact ^[1] - 18:22</p> <p>exactly ^[9] - 19:13, 20:6, 26:12, 26:14, 28:24, 34:23, 50:6, 50:9, 53:7</p> <p>example ^[3] - 6:14, 13:22, 48:21</p> <p>exceeded ^[1] - 8:15</p> <p>exchange ^[2] - 26:21, 30:18</p> <p>exchanged ^[2] - 7:15, 21:14</p>	<p>exchanges ^[1] - 15:17</p> <p>exhibit ^[1] - 14:6</p> <p>exist ^[1] - 20:13</p> <p>existing ^[1] - 40:24</p> <p>expect ^[2] - 30:10, 48:24</p> <p>expert ^[2] - 53:24</p> <p>expiration ^[1] - 57:19</p> <p>expired ^[1] - 43:12</p> <p>explain ^[4] - 11:1, 23:3, 26:25, 55:11</p> <p>explained ^[4] - 6:20, 16:8, 19:6, 29:4</p> <p>explanation ^[1] - 11:3</p> <p>extend ^[1] - 9:20</p> <p>extent ^[6] - 5:13, 10:13, 19:17, 35:24, 54:17, 57:2</p> <p>extremely ^[1] - 52:22</p>
F				
<p>face ^[1] - 31:5</p> <p>fact ^[9] - 8:24, 12:7, 17:1, 20:4, 23:5, 37:3, 39:4, 39:20, 45:15</p> <p>factor ^[2] - 11:9, 11:11</p> <p>factors ^[3] - 16:7, 53:17, 54:4</p> <p>facts ^[5] - 5:15, 28:23, 53:11, 53:18, 54:3</p> <p>failed ^[2] - 30:6, 43:14</p> <p>fair ^[3] - 37:5, 37:7, 41:10</p> <p>faith ^[1] - 10:17</p> <p>fall ^[1] - 25:18</p> <p>far ^[1] - 19:23</p> <p>Farnan ^[1] - 3:17</p> <p>FARNAN ^[2] - 2:9, 3:16</p> <p>fear ^[1] - 38:15</p> <p>feature ^[1] - 19:21</p> <p>features ^[1] - 53:4</p> <p>Federal ^[3] - 16:8, 36:6, 53:15</p> <p>felt ^[1] - 26:11</p> <p>few ^[2] - 38:10, 43:2</p> <p>figure ^[1] - 38:20</p> <p>FILED ^[1] - 59:16</p> <p>files ^[1] - 31:4</p> <p>filings ^[2] - 47:7, 47:11</p> <p>final ^[1] - 8:19</p> <p>finally ^[2] - 10:18, 48:8</p> <p>finance ^[1] - 17:14</p> <p>financial ^[4] - 13:19, 48:22, 54:24, 56:13</p> <p>financials ^[1] - 29:8</p>				

financing [2] - 17:7, 17:11 fine [2] - 4:8, 21:15 FINGER [2] - 2:8, 2:16 Finger [1] - 3:18 first [16] - 4:23, 6:18, 6:19, 10:15, 13:11, 18:25, 19:24, 37:12, 38:5, 40:8, 46:12, 49:5, 49:17, 52:25, 54:24, 55:24 five [3] - 11:11, 28:8, 29:1 flexibility [1] - 28:19 focus [2] - 18:14, 18:17 footing [1] - 43:5 footnote [1] - 35:20 FOR [1] - 1:2 forced [1] - 8:3 forecasts [1] - 56:13 foregoing [2] - 59:8, 59:13 forth [1] - 27:22 forward [1] - 56:22 four [6] - 29:16, 31:14, 32:16, 39:4, 44:22, 49:15 four-month [1] - 49:15 FRED [1] - 2:16 Fred [1] - 4:3 Friday [2] - 27:25 front [3] - 7:17, 12:15, 26:1 fruitless [1] - 46:22 frustrating [1] - 47:22 full [2] - 10:13, 53:18 functionality [2] - 45:24, 54:2 funding [20] - 17:7, 17:10, 20:25, 22:2, 22:5, 22:8, 22:12, 22:17, 22:21, 23:3, 23:7, 23:12, 23:16, 23:21, 23:24, 24:17, 24:19, 25:10, 25:13, 25:15 funding-related [1] - 22:12	19:4, 19:15, 31:13, 31:14, 36:13, 40:8, 49:22 global [1] - 26:7 GOLDEN [2] - 2:2, 3:8 golden [1] - 3:9 good-faith [1] - 10:17 GOODRICH [1] - 2:19 GOOGLE [1] - 1:13 Google [42] - 2:20, 3:5, 4:1, 4:4, 4:24, 5:24, 6:2, 6:5, 6:24, 7:21, 7:22, 8:12, 8:14, 8:15, 9:6, 17:18, 24:11, 29:17, 32:21, 33:8, 34:24, 35:2, 35:22, 36:13, 37:6, 37:13, 37:14, 37:20, 39:10, 39:18, 40:6, 42:12, 43:2, 45:15, 46:19, 52:9, 53:22, 54:5, 54:22, 56:8, 57:12, 57:15 Google's [6] - 37:9, 38:3, 42:8, 42:22, 44:7, 53:4 grant [1] - 55:5 great [4] - 3:13, 4:8, 57:25, 58:5 Griffin [1] - 4:5 GRIFFING [1] - 2:17 guess [1] - 38:4 guidance [1] - 34:17	historical [2] - 56:15 hold [2] - 14:21, 50:23 holder [1] - 18:4 holding [2] - 20:16, 42:12 holidays [1] - 38:19 Honor [45] - 3:8, 3:17, 4:2, 4:20, 6:1, 7:12, 8:11, 9:13, 11:2, 12:9, 12:16, 12:24, 13:21, 14:19, 15:8, 17:4, 17:16, 18:23, 19:23, 22:8, 24:7, 24:13, 26:5, 26:18, 28:15, 28:17, 29:11, 31:18, 32:3, 33:7, 34:20, 37:7, 37:11, 39:2, 40:17, 43:1, 47:1, 47:22, 49:1, 52:2, 54:21, 54:22, 55:21, 57:10, 57:13 Honor's [1] - 57:23 Honorable [1] - 1:19 hope [1] - 53:9 hopefully [1] - 6:13 hypothetical [17] - 14:12, 16:6, 16:10, 16:11, 16:18, 19:5, 19:7, 19:10, 19:14, 19:18, 52:22, 52:24, 53:8, 53:14, 53:20, 53:25, 54:25	individuals [1] - 29:19 inform [1] - 16:12 information [24] - 11:16, 11:20, 11:25, 13:14, 13:25, 16:17, 20:23, 21:2, 23:7, 28:21, 31:3, 34:10, 35:13, 44:17, 45:6, 45:23, 49:23, 50:14, 54:1, 54:6, 56:7, 56:13, 57:19 infringement [9] - 16:22, 30:8, 35:22, 36:14, 43:7, 43:9, 43:10, 52:25, 53:19 infringer [1] - 11:13 infringes [1] - 45:25 infringing [1] - 11:18 initial [1] - 10:11 inspection [1] - 33:24 instead [1] - 40:2 insurance [1] - 22:17 intend [2] - 10:22, 15:20 intent [1] - 45:16 intention [1] - 15:24 interested [2] - 51:7, 51:8 interesting [1] - 49:13 interrogatories [18] - 4:19, 5:4, 5:8, 5:10, 5:11, 7:6, 7:23, 7:25, 8:6, 8:13, 8:14, 8:17, 8:20, 8:22, 8:23, 9:8, 9:9, 9:22 interrogatory [4] - 5:25, 6:21, 8:16, 8:19 Interrogatory [1] - 6:15 introduced [2] - 19:21, 53:5 invalidity [2] - 16:23, 24:20 invites [1] - 5:19 IP [1] - 22:17 ironic [1] - 21:8 issue [32] - 4:23, 5:4, 5:9, 5:15, 5:25, 6:24, 10:4, 13:2, 14:24, 15:6, 15:9, 17:4, 17:5, 17:11, 22:2, 26:12, 27:19, 29:11, 30:14, 32:7, 37:23, 39:3, 39:12, 42:8, 44:24, 49:14, 54:9, 54:18, 56:1, 56:2, 57:16, 57:22 issued [1] - 53:3 issues [21] - 4:13,	10:2, 14:3, 18:11, 24:20, 26:7, 28:23, 30:1, 33:10, 33:14, 35:7, 36:18, 38:20, 39:16, 41:20, 41:21, 45:5, 45:8, 48:15, 57:10, 57:15 item [2] - 40:18, 57:17 itself [1] - 16:12
J				
JAFFE [8] - 2:19, 6:1, 33:7, 34:5, 37:6, 40:17, 41:15, 57:13 Jaffe [5] - 4:6, 6:2, 33:8, 57:14 jam [1] - 48:13 Jen [1] - 3:2 Jennifer [1] - 1:19 JLH [2] - 1:6, 1:12 joined [1] - 3:20 Jordan [4] - 4:6, 6:2, 33:8, 57:14 JORDAN [1] - 2:19 Judge [6] - 6:14, 6:19, 10:9, 22:11, 24:22, 36:3 July [1] - 49:6 juncture [1] - 43:17 June [5] - 28:17, 30:15, 43:25, 49:6, 49:18 jurisdiction [1] - 5:22 justification [1] - 19:3 justifies [1] - 43:16				
K				
keep [5] - 9:1, 33:3, 39:18, 50:25, 51:14 KELLY [1] - 2:9 Kelly [1] - 3:17 KIMBERLY [1] - 2:13 Kimberly [1] - 3:22 kind [2] - 41:23, 42:2 knowledge [2] - 53:13, 53:18 knows [4] - 48:1, 48:2, 48:3, 52:25				
L				
lack [1] - 36:13 lag [1] - 49:15 large [1] - 38:17 largely [2] - 20:16, 33:13				

<p>larger [1] - 6:21</p> <p>last [18] - 11:14, 12:18, 17:12, 26:19, 27:24, 27:25, 35:18, 39:23, 41:17, 44:13, 45:2, 46:20, 46:21, 47:5, 47:18, 47:20, 50:8, 57:15</p> <p>late [1] - 47:5</p> <p>LATHAM [1] - 2:11</p> <p>Latham [2] - 3:21, 4:21</p> <p>Laura [1] - 3:22</p> <p>law [6] - 7:24, 8:4, 10:24, 12:1, 23:8, 51:17</p> <p>lays [1] - 6:14</p> <p>Layton [2] - 3:18, 4:3</p> <p>LAYTON [2] - 2:8, 2:16</p> <p>least [9] - 7:6, 11:5, 12:25, 28:11, 28:13, 31:11, 31:15, 34:18, 35:3</p> <p>leave [1] - 36:5</p> <p>left [2] - 38:23, 57:7</p> <p>less [2] - 29:15, 30:23</p> <p>letter [7] - 5:3, 13:1, 14:7, 25:21, 25:24, 35:19, 43:14</p> <p>letters [4] - 4:11, 4:17, 7:14, 42:20</p> <p>level [1] - 49:4</p> <p>Li [1] - 2:13</p> <p>Li [1] - 3:22</p> <p>liability [2] - 16:22, 18:11</p> <p>license [1] - 11:8</p> <p>licensed [1] - 11:5</p> <p>licenses [7] - 11:4, 11:6, 14:13, 14:15, 20:18, 45:5, 52:11</p> <p>licensing [7] - 11:8, 17:23, 24:19, 28:5, 29:8, 47:13, 50:14</p> <p>likelihood [1] - 19:20</p> <p>likely [4] - 31:11, 40:14, 56:5</p> <p>limit [2] - 6:11, 8:16</p> <p>limitations [1] - 15:10</p> <p>limited [4] - 30:6, 43:11, 44:24, 51:19</p> <p>line [7] - 3:2, 3:11, 3:20, 3:23, 4:9, 56:9, 56:17</p> <p>list [4] - 27:17, 31:9, 32:6, 57:15</p> <p>listening [1] - 57:5</p> <p>litigation [14] - 15:14, 15:18, 17:13, 17:15,</p>	<p>17:22, 20:24, 22:2, 22:5, 22:8, 23:21, 23:24, 24:17, 25:10, 25:13</p> <p>litigations [2] - 20:19, 30:5</p> <p>LLC [1] - 59:22</p> <p>LLP [1] - 2:11</p> <p>local [3] - 26:3, 31:9</p> <p>located [3] - 28:22, 29:9, 29:19</p> <p>log [6] - 18:1, 21:4, 21:13, 24:2, 24:15, 25:16</p> <p>logged [4] - 21:23, 23:23, 24:24, 25:14</p> <p>logging [2] - 18:6, 21:15</p> <p>look [8] - 4:10, 6:12, 14:14, 16:10, 17:2, 17:20, 46:4, 48:9</p> <p>lookback [1] - 52:14</p> <p>looking [4] - 14:6, 30:16, 46:20, 46:21</p> <p>lost [11] - 10:17, 10:19, 12:8, 12:12, 13:3, 14:9, 14:23, 14:25, 15:3, 16:4, 39:4</p>	<p>materials [3] - 16:1, 18:9, 29:9</p> <p>matter [7] - 20:4, 27:5, 27:8, 27:9, 39:14, 39:20</p> <p>MCKOOL [1] - 2:4</p> <p>McKool [1] - 3:11</p> <p>mean [3] - 30:20, 39:7, 50:23</p> <p>meaningful [4] - 26:24, 29:2, 29:12, 29:22</p> <p>meet [4] - 29:6, 41:5, 42:18, 50:4</p> <p>meet-and-confer [2] - 29:6, 41:5</p> <p>meet-and-confers [1] - 42:18</p> <p>meeting [4] - 33:16, 41:18, 42:2, 44:19</p> <p>Megatives [1] - 6:12</p> <p>mention [1] - 35:18</p> <p>mentioned [3] - 6:4, 7:4, 40:19</p> <p>merely [1] - 15:16</p> <p>met [2] - 34:12, 47:19</p> <p>microcomputed [1] - 51:18</p> <p>Microsoft [4] - 14:13, 15:18, 20:20, 49:12</p> <p>might [7] - 17:3, 20:14, 22:23, 23:4, 26:23, 30:24, 31:7</p> <p>million [3] - 15:14, 19:1</p> <p>mind [2] - 37:20, 51:14</p> <p>minimum [1] - 18:6</p> <p>minuscule [1] - 21:2</p> <p>missing [1] - 48:10</p> <p>modified [1] - 52:17</p> <p>month [1] - 49:15</p> <p>months [13] - 5:5, 7:16, 9:11, 9:12, 9:13, 10:16, 11:14, 32:16, 38:10, 39:4, 43:3, 44:23, 45:12</p> <p>MOORE [1] - 2:6</p> <p>Moore [1] - 3:12</p> <p>most [3] - 28:20, 31:11, 47:22</p> <p>mostly [1] - 41:14</p> <p>motion [8] - 15:4, 17:17, 29:17, 36:2, 36:4, 36:10, 36:17, 36:19</p> <p>move [4] - 15:6, 25:20, 35:19, 56:22</p> <p>moving [1] - 50:25</p> <p>MR [31] - 3:8, 6:1,</p>	<p>12:9, 12:16, 12:18, 12:24, 14:18, 18:23, 20:10, 22:7, 26:5, 26:16, 27:20, 31:18, 32:2, 33:7, 34:5, 37:6, 37:11, 39:6, 40:17, 41:15, 46:9, 46:12, 52:2, 52:6, 54:21, 55:21, 55:24, 57:9, 57:13</p> <p>MS [14] - 3:16, 4:20, 7:12, 8:11, 9:11, 10:3, 15:8, 24:7, 24:13, 25:19, 28:15, 42:24, 44:12, 49:1</p> <p>multiple [5] - 7:19, 8:2, 8:12, 8:13, 24:21</p> <p>must [1] - 23:8</p>	<p>8:12, 8:21, 9:12, 10:2, 10:4, 11:24, 12:25, 13:8, 13:15, 13:18, 14:15, 15:7, 19:3, 19:15, 22:15, 22:19, 23:2, 24:4, 27:2, 27:11, 27:16, 27:18, 28:10, 28:16, 29:24, 32:20, 37:24, 39:11, 39:18, 42:21, 42:22, 42:25, 43:8, 43:17, 43:18, 44:3, 44:10, 45:7, 46:3, 46:19, 47:2, 47:7, 47:15, 47:24, 48:1, 48:18, 51:21, 51:25, 52:6, 52:12, 53:22, 54:5, 54:22, 55:16, 55:25, 56:8, 57:8</p> <p>NETFLIX [2] - 1:7, 59:9</p> <p>Netflix's [5] - 14:3, 14:7, 45:5, 52:5, 53:4</p> <p>never [3] - 19:25, 55:14</p> <p>NEW [2] - 59:3, 59:17</p> <p>new [1] - 13:10</p> <p>news [1] - 47:12</p> <p>Nexstep [1] - 10:10</p> <p>nexstep [1] - 13:8</p> <p>next [4] - 15:6, 39:12, 41:18, 51:20</p> <p>night [4] - 27:24, 27:25, 47:5, 47:20</p> <p>non [3] - 36:25, 47:25, 48:23</p> <p>non-custodial [2] - 47:25, 48:23</p> <p>non-e-mail [1] - 36:25</p> <p>noncustodial [4] - 29:10, 30:11, 34:10, 35:13</p> <p>none [2] - 6:9, 23:1</p> <p>noted [2] - 7:20, 35:20</p> <p>notes [2] - 13:21, 59:12</p> <p>nothing [1] - 19:24</p> <p>notwithstanding [1] - 11:13</p> <p>November [10] - 32:14, 37:1, 37:2, 37:18, 38:3, 38:18, 40:1, 40:13, 42:13, 48:7</p> <p>Number [1] - 59:9</p> <p>number [13] - 3:3, 5:21, 5:25, 8:16, 11:10, 11:11, 13:9, 29:25, 30:14, 32:6,</p>
			N	
			<p>names [1] - 30:18</p> <p>near [1] - 38:17</p> <p>nearly [4] - 9:12, 45:4, 49:8, 49:18</p> <p>necessarily [1] - 30:20</p> <p>necessary [2] - 35:8, 52:19</p> <p>need [32] - 12:5, 19:18, 21:12, 21:21, 21:23, 22:2, 22:4, 23:25, 26:8, 28:12, 28:13, 31:8, 32:8, 32:19, 32:22, 33:4, 34:11, 35:14, 36:17, 38:12, 38:24, 40:2, 40:10, 41:5, 49:24, 50:3, 53:11, 55:12, 55:18, 55:20, 57:5</p> <p>needed [1] - 26:14</p> <p>needing [1] - 51:15</p> <p>needle [1] - 46:21</p> <p>needs [11] - 9:21, 21:17, 23:23, 25:14, 30:25, 31:1, 35:9, 39:1, 50:25, 51:17, 51:18</p> <p>negotiating [1] - 53:14</p> <p>negotiation [16] - 14:12, 16:7, 16:10, 16:11, 16:19, 19:6, 19:8, 19:10, 19:14, 19:18, 52:23, 52:24, 53:8, 53:21, 53:25, 55:1</p> <p>Netflix [69] - 2:14, 3:4, 3:15, 3:19, 3:23, 4:18, 4:22, 4:24, 7:15, 7:21, 7:22,</p>	
	M			
	<p>mail [33] - 26:14, 26:23, 30:21, 32:8, 32:12, 32:20, 32:23, 33:2, 33:9, 34:11, 34:15, 34:22, 35:2, 35:8, 35:14, 36:1, 36:12, 36:18, 36:25, 37:21, 38:1, 38:6, 38:8, 38:12, 38:20, 38:25, 42:7, 43:13, 43:16, 43:18, 44:1, 48:15, 50:21</p> <p>mails [12] - 19:3, 27:5, 27:8, 27:15, 31:6, 31:22, 37:4, 37:23, 38:22, 40:9, 44:6, 49:10</p> <p>man [1] - 20:15</p> <p>manifest [1] - 46:16</p> <p>manufactured [1] - 6:19</p> <p>March [2] - 5:5, 49:16</p> <p>marginally [2] - 20:14, 31:7</p> <p>marketing [1] - 28:3</p> <p>massive [1] - 20:22</p> <p>material [1] - 50:13</p>			

33:20, 33:25, 41:16 numerosity [5] - 4:25, 5:9, 6:9, 7:3, 8:1	outside [4] - 52:1, 52:8, 53:2, 55:12 outstanding [3] - 34:14, 40:22, 42:15 outweighed [1] - 21:3 overarching [1] - 41:23 overrule [1] - 6:9 own [1] - 47:12	period [23] - 19:11, 20:3, 20:13, 21:3, 31:25, 35:3, 52:1, 52:8, 52:10, 52:21, 52:23, 53:2, 53:6, 54:3, 54:5, 56:6, 56:7, 56:11, 56:12, 56:14, 56:19, 57:16 permitted [1] - 36:5 person [1] - 31:3 pertaining [1] - 25:9 pertains [1] - 25:11 phased [2] - 35:4, 38:1 phases [1] - 35:12 phasing [2] - 36:16, 38:25 phasing-in [1] - 38:25 phone [1] - 50:22 pick [1] - 55:9 picture [2] - 51:6, 51:10 piece [1] - 17:13 pin [1] - 19:16 plaintiff [6] - 5:1, 7:13, 10:7, 13:23, 18:4, 21:25 Plaintiff [3] - 1:4, 1:10, 2:7 plaintiff's [1] - 24:2 plaintiffs [1] - 51:6 plan [1] - 36:9 play [2] - 11:6, 36:17 playlist [2] - 19:20, 53:4 plenty [2] - 25:12, 37:2 point [18] - 7:25, 19:16, 21:1, 21:7, 23:25, 27:9, 31:16, 34:3, 34:12, 36:3, 43:22, 44:1, 48:10, 52:16, 55:3, 55:5, 56:4, 57:4 pointed [3] - 16:3, 44:2, 54:23 policy [1] - 22:17 position [17] - 7:18, 9:6, 17:9, 17:12, 18:18, 18:22, 19:25, 20:8, 20:11, 26:11, 30:13, 32:22, 35:15, 35:16, 41:14, 52:5, 53:23 positions [1] - 7:21 possess [1] - 11:20 possession [4] - 11:17, 12:1, 14:1, 49:10 possibly [1] - 19:7 post [3] - 18:19, 19:4,	21:18 post-2014 [1] - 23:14 post-date [1] - 21:18 post-dating [2] - 18:19, 19:4 potential [2] - 20:24, 23:3 potentially [1] - 53:23 practice [2] - 5:18, 5:20 practicing [1] - 16:13 pre-2014 [1] - 17:20 preceding [1] - 52:10 predates [3] - 19:11, 52:23, 54:6 predating [2] - 52:21, 56:12 predetermined [1] - 27:7 prepared [1] - 36:24 present [2] - 43:5, 59:7 presented [4] - 14:24, 30:2, 37:24, 43:23 presumed [1] - 53:17 previously [2] - 11:5, 27:20 primary [3] - 22:7, 30:9, 45:23 privilege [4] - 18:3, 18:5, 21:13, 25:2 privileged [11] - 17:3, 17:25, 18:6, 18:21, 20:12, 20:23, 21:5, 21:22, 22:4, 24:2, 24:25 problem [3] - 27:2, 37:25, 41:3 proceedings [1] - 59:8 process [5] - 27:12, 27:13, 29:6, 38:1, 39:1 produce [21] - 15:20, 21:11, 27:4, 27:15, 28:12, 31:8, 32:22, 33:4, 40:2, 41:1, 45:16, 47:17, 48:5, 49:24, 51:25, 52:7, 52:10, 54:16, 56:10 produced [28] - 14:15, 15:13, 17:21, 18:25, 20:19, 21:21, 23:25, 31:22, 32:11, 33:20, 33:22, 33:23, 34:3, 34:9, 38:22, 41:14, 41:24, 42:14, 45:4, 47:9, 48:4, 48:20, 48:23, 49:7, 49:9, 49:18, 50:8 producing [10] -	15:24, 22:13, 30:10, 37:22, 39:9, 40:9, 45:10, 49:7, 50:3, 50:5 product [4] - 11:18, 16:14, 16:15 production [25] - 14:3, 15:10, 17:19, 17:20, 18:15, 18:16, 21:19, 22:16, 25:25, 32:14, 33:18, 34:6, 35:7, 35:13, 35:17, 36:25, 37:15, 37:17, 40:12, 44:11, 45:2, 45:3, 47:3, 47:6, 49:14 productive [1] - 27:10 products [2] - 45:9, 50:15 profits [10] - 10:18, 10:20, 12:8, 12:13, 13:3, 14:9, 14:23, 14:25, 15:3, 16:4 progress [1] - 4:14 pronouncing [1] - 6:13 proper [1] - 50:1 properly [1] - 24:24 proportional [2] - 35:9, 51:16 proposal [9] - 35:4, 37:9, 38:4, 40:10, 40:15, 42:8, 42:9, 42:22, 44:8 proposed [1] - 35:5 proposition [1] - 22:21 propound [2] - 33:11, 41:4 propounded [1] - 40:25 protective [1] - 39:22 prove [1] - 18:5 provide [3] - 9:18, 13:23, 44:15 provided [1] - 31:20 providing [1] - 44:14 provision [2] - 46:15, 52:17 public [4] - 47:6, 47:11, 47:21 pull [1] - 50:12 pursue [2] - 10:19, 30:4 put [4] - 3:6, 31:2, 31:8, 32:5 putting [4] - 9:20, 32:19, 32:23, 53:22
O	P			
objection [2] - 7:4, 22:7 objectionable [1] - 7:23 objections [6] - 6:9, 8:1, 8:5, 44:16, 45:1, 50:2 obligation [6] - 10:8, 11:1, 11:21, 13:13, 24:2, 24:15 obligations [3] - 44:19, 50:4, 50:12 obtaining [1] - 51:7 obviously [4] - 12:2, 15:21, 48:2, 50:12 occurred [3] - 19:8, 19:12, 19:14 OF [4] - 1:2, 1:16, 59:2, 59:3 offered [1] - 7:20 office [2] - 3:19, 4:4 OFFICIALLY [1] - 59:16 oldest [1] - 53:3 once [1] - 4:13 one [21] - 5:14, 7:2, 8:21, 8:22, 9:22, 11:5, 12:25, 13:9, 22:16, 22:19, 23:20, 30:8, 33:25, 35:22, 37:23, 40:6, 40:18, 56:4, 57:15, 57:17 ones [4] - 40:25, 42:16, 44:20, 45:19 opening [1] - 44:23 operation [1] - 20:16 operations [1] - 28:3 opinion [1] - 53:25 opposed [1] - 35:14 opposing [1] - 29:17 opposite [1] - 20:7 opposition [1] - 17:17 order [12] - 20:13, 23:16, 23:24, 27:11, 32:17, 36:6, 38:7, 39:22, 50:20, 51:25, 52:16, 54:15 orders [1] - 25:25 organized [1] - 42:20 otherwise [1] - 25:3 ourselves [1] - 14:2 outcome [1] - 27:7 outset [1] - 13:24	P.A. [3] - 2:2, 2:8, 2:16 PA [1] - 3:10 Pacific [5] - 11:9, 11:11, 16:7, 53:17, 54:4 package [1] - 11:8 page [2] - 14:8, 30:16 pages [3] - 19:2, 47:5, 59:14 paint [2] - 51:5, 51:11 papers [2] - 12:2, 13:20 paragraph [2] - 14:8, 14:11 parse [2] - 26:8, 26:13 part [6] - 7:2, 7:3, 17:5, 17:15, 27:18, 39:3 particular [2] - 23:4, 46:3 particularly [1] - 9:5 parties [15] - 9:5, 9:23, 11:19, 16:9, 16:16, 21:12, 26:20, 28:18, 30:17, 35:5, 39:24, 41:4, 42:16, 53:12, 53:18 party [4] - 8:3, 21:10, 22:24, 30:24 past [3] - 7:15, 27:16, 27:25 patent [8] - 11:18, 13:22, 20:18, 35:24, 36:5, 36:11, 43:4, 53:3 patent-in-suit [1] - 53:3 patentee [2] - 11:9, 11:12 patents [3] - 11:4, 35:23, 43:12 patents-in-suit [2] - 11:4, 35:23 pending [4] - 8:18, 8:20, 9:10, 9:23 people [1] - 31:13 perhaps [1] - 51:6			

Q	relating [3] - 17:6, 17:22, 45:5	40:4, 43:16, 43:25, 44:21, 44:24, 45:11, 49:5, 49:9, 49:16, 49:25, 55:9, 55:20	road [1] - 43:3	SCHOENBAUM [1] - 2:17
quote [1] - 53:14	relationship [1] - 11:12		ROBOCAST [3] - 1:3, 1:9, 59:9	scope [7] - 16:15, 16:22, 27:15, 38:6, 38:8, 38:21, 41:5
R	relevance [5] - 16:3, 22:25, 23:12, 24:22, 54:14	require [3] - 13:16, 21:14, 23:6	Robocast [44] - 3:4, 3:5, 3:7, 3:10, 5:1, 5:19, 6:6, 7:11, 7:13, 7:14, 7:24, 9:3, 9:6, 9:16, 9:21, 10:8, 10:13, 11:15, 12:4, 12:10, 13:17, 15:13, 17:11, 18:13, 18:25, 19:23, 19:25, 20:5, 20:15, 21:10, 21:17, 23:7, 24:15, 29:2, 29:24, 31:12, 32:16, 35:25, 37:9, 37:14, 40:19, 44:4, 46:1, 53:23	screenshots [1] - 47:12
Rachel [6] - 3:21, 4:21, 10:3, 24:14, 28:16, 42:24	relevant [39] - 13:25, 15:21, 16:2, 16:6, 16:17, 16:21, 16:25, 18:7, 18:10, 18:21, 19:5, 19:7, 19:17, 20:1, 20:3, 20:15, 21:2, 22:6, 22:9, 22:13, 22:22, 22:24, 23:4, 25:5, 28:20, 31:6, 31:7, 31:16, 43:13, 44:6, 45:23, 49:19, 50:13, 52:22, 53:11, 54:17, 55:15, 57:20	required [1] - 26:2	Robocast's [13] - 10:5, 15:9, 17:13, 25:21, 25:24, 26:2, 27:1, 35:15, 43:14, 49:2, 51:20, 51:24, 57:10	SEALED [1] - 59:16
RACHEL [1] - 2:12	relies [1] - 22:19	requires [1] - 10:11	roll [1] - 37:17	search [3] - 18:9, 21:17, 30:20
raise [1] - 24:6	rely [1] - 10:13	reraise [1] - 55:19	rolling [4] - 34:6, 36:24, 45:2, 50:6	SEC [2] - 47:6, 47:11
raised [3] - 15:1, 15:9, 44:4	remaining [1] - 35:10	research [1] - 28:5	Ronald [1] - 3:9	second [4] - 10:4, 17:5, 18:17
raising [1] - 17:14	remind [1] - 50:22	resolve [1] - 6:8	RONALD [1] - 2:2	see [9] - 4:15, 10:15, 30:19, 37:25, 40:1, 40:25, 41:19, 48:9, 57:18
rate [1] - 14:16	reminded [1] - 4:11	resolved [3] - 15:5, 15:19, 51:22	ROSATI [1] - 2:19	seek [4] - 10:22, 11:24, 13:4, 29:7
rather [3] - 7:6, 29:24, 45:9	repeat [1] - 6:3	respect [8] - 8:14, 9:5, 25:24, 32:8, 41:11, 42:7, 42:17, 45:15	roughly [1] - 52:8	seeking [6] - 12:8, 12:12, 14:25, 15:3, 22:24, 49:24
re [1] - 36:6	repeatedly [3] - 16:4, 29:4, 47:15	respectfully [1] - 10:11	round [4] - 10:16, 27:22	seeks [1] - 5:15
read [3] - 4:17, 28:10, 30:23	reported [1] - 59:7	respond [5] - 5:6, 9:21, 39:8, 46:10, 54:19	royalty [5] - 10:23, 13:5, 14:10, 14:16, 54:8	seem [1] - 4:13
really [8] - 10:21, 22:4, 22:23, 39:1, 40:7, 41:6, 49:13, 49:20	reporter [1] - 4:9	responded [3] - 8:6, 9:4, 33:15	RPFs [1] - 26:6	Sellix [1] - 36:7
reason [9] - 13:16, 32:25, 36:15, 40:11, 41:1, 43:15, 43:20, 44:5, 55:6	Reporter [2] - 59:5, 59:6	response [3] - 5:7, 7:25, 42:4	rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	sense [4] - 34:15, 34:25, 47:1, 58:1
reasonable [6] - 10:23, 13:5, 14:10, 18:9, 54:8, 58:2	representation [1] - 24:18	responses [9] - 8:17, 36:25, 41:16, 41:21, 42:1, 44:15, 45:1, 49:6, 50:2	Rule [6] - 10:5, 10:8, 11:21, 12:6, 12:11, 13:6	separate [1] - 7:1
reasons [3] - 6:23, 9:15, 30:9	representations [2] - 46:2, 49:2	responsive [15] - 5:3, 6:7, 21:19, 21:21, 21:22, 23:20, 24:16, 25:8, 25:15, 44:16, 45:17, 49:8, 49:23, 51:25, 54:11	rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	September [2] - 9:12, 59:19
received [2] - 39:9, 47:2	represented [2] - 15:13, 29:15	rest [1] - 33:4	rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	serve [2] - 9:7, 44:23
record [11] - 3:6, 21:9, 25:1, 26:4, 26:7, 41:7, 44:9, 44:17, 50:17, 51:19, 51:23	reproduced [1] - 49:11	restricted [1] - 46:25	rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	served [27] - 5:4, 5:8, 5:10, 5:12, 8:9, 8:13, 8:15, 8:16, 8:18, 8:21, 39:5, 39:7, 39:14, 39:15, 39:17, 40:4, 41:15, 44:13, 44:18, 44:22, 44:25, 45:12, 45:20, 49:5, 49:16, 49:17, 54:24
reference [1] - 13:3	reproducing [1] - 15:16	reusing [1] - 15:16	rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	set [5] - 8:21, 8:23, 40:22, 49:4, 54:23
refile [2] - 36:5, 36:10	reproduction [1] - 15:16	revenue [2] - 45:6, 50:14	rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	setting [1] - 16:4
reflect [1] - 56:6	request [15] - 21:19, 25:8, 25:10, 35:17, 49:17, 51:20, 51:24, 54:20, 55:4, 55:7, 56:1, 57:2, 57:3, 57:24	revenues [1] - 56:16	rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	severely [2] - 46:24, 54:7
refuse [2] - 7:7, 16:14	request-by-request [1] - 56:1	review [4] - 39:19, 39:21, 46:14, 47:8	rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	shift [1] - 11:23
refused [4] - 11:15, 47:17, 47:18, 52:6	requested [4] - 27:11, 34:4, 41:12, 48:22	reviewed [1] - 46:1	rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	Shomaker [2] - 3:12, 7:13
regard [3] - 13:7, 33:9, 40:24	requests [25] - 23:20, 26:2, 26:9, 26:14, 32:16, 34:21, 39:5, 39:7, 39:8, 39:14, 39:16, 39:17, 40:3,	reviewing [2] - 44:14, 49:25	rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	SHOMAKER [4] - 2:5, 7:12, 8:11, 9:11
regarding [1] - 33:18		RFP [5] - 33:10, 33:21, 41:16, 49:21, 54:23	rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	short [1] - 38:10
reiterate [1] - 50:19		RFPs [14] - 33:11, 33:15, 33:17, 33:19, 34:14, 34:16, 34:25, 40:20, 40:24, 41:8, 41:17, 41:25, 42:4, 44:13	rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	Shorthand [2] - 59:5, 59:6
reiterated [1] - 8:2		RICHARDS [2] - 2:8, 2:16	rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	shorthand [2] - 59:7, 59:12
reiterating [1] - 39:18		Richards [2] - 3:18, 4:3	rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	show [2] - 17:21, 26:3
relate [1] - 6:16		risk [1] - 25:3	rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	showing [3] - 23:11, 36:1, 52:17
related [6] - 20:24, 22:12, 28:22, 33:13, 45:8, 45:11			rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	shown [1] - 16:24
relates [8] - 10:6, 17:8, 17:10, 29:12, 29:24, 30:7, 44:12, 46:2			rule [6] - 13:22, 26:3, 28:10, 31:9, 31:10, 57:1	side [3] - 26:24, 28:14,

<p>51:4 sides [2] - 30:19, 51:12 SIGNED [1] - 59:16 similarly [1] - 45:14 simply [2] - 6:8, 13:23 single [6] - 5:6, 5:7, 7:2, 43:14, 49:21, 54:19 situated [1] - 45:14 situation [6] - 33:10, 38:16, 42:12, 43:2, 51:14, 52:20 six [8] - 5:5, 9:11, 9:12, 9:13, 11:14, 14:9, 19:13, 52:14 six-year [1] - 52:14 SMITH [1] - 2:4 Smith [1] - 3:11 sole [1] - 17:8 solely [2] - 11:25, 25:14 solve [1] - 10:21 sometime [3] - 12:18, 19:22, 53:9 SONSINI [1] - 2:19 Sonsini [1] - 4:6 sorry [2] - 24:13, 27:24 sort [3] - 20:12, 38:19, 41:19 sorted [1] - 46:19 sorting [1] - 48:15 sought [2] - 22:16, 28:24 sound [1] - 42:22 sounds [2] - 15:11, 31:14 source [14] - 29:8, 33:23, 39:19, 39:21, 45:21, 45:22, 45:23, 46:5, 46:13, 46:14, 46:16, 46:17, 46:20, 48:23 sources [3] - 29:10, 30:11, 48:1 speaking [1] - 4:7 specific [8] - 26:6, 33:17, 33:21, 34:21, 35:16, 41:20, 41:22, 43:19 specifically [1] - 35:4 specifics [1] - 34:16 Speedbudget [1] - 59:22 squarely [1] - 11:16 ss [1] - 59:2 stand [2] - 13:4, 22:20 standard [1] - 31:10 standing [1] - 17:1</p>	<p>standpoint [1] - 27:1 stands [1] - 22:22 start [8] - 4:16, 5:20, 10:20, 38:13, 39:1, 39:8, 48:8, 48:11 starting [1] - 3:6 STATE [1] - 59:2 statements [2] - 26:19, 33:19 STATES [1] - 1:1 status [1] - 48:23 Stenotype [1] - 59:7 step [1] - 41:18 still [3] - 14:10, 32:11, 37:2 stop [1] - 14:5 straight [1] - 31:5 strategy [1] - 17:16 struck [1] - 13:10 stuff [1] - 33:5 submissions [2] - 15:11, 15:17 submitted [2] - 7:16, 23:2 subpart [1] - 6:24 subparts [5] - 6:10, 6:22, 7:1, 7:19, 8:24 substantial [8] - 32:13, 35:6, 37:17, 38:2, 38:18, 45:18, 48:12, 50:24 substantially [6] - 6:11, 40:12, 41:1, 41:24, 43:5, 47:17 substantive [3] - 5:7, 43:15 subsumed [2] - 6:21, 7:1 sue [1] - 15:3 sufficiency [1] - 37:14 sufficient [3] - 19:15, 33:22, 35:12 sufficiently [1] - 45:17 suit [4] - 11:4, 21:11, 35:23, 53:3 summer [2] - 4:13, 39:5 supplemental [2] - 41:16, 41:21 supports [1] - 7:18 supposed [1] - 12:20 surrounding [3] - 53:12, 53:19, 54:4 switch [1] - 48:18</p>	<p>talks [3] - 11:11, 14:9, 23:21 TARA [1] - 2:12 Tara [1] - 3:21 technical [5] - 27:21, 39:17, 40:19, 44:13, 47:10 technologies [1] - 6:17 teed [1] - 37:13 teleconference [4] - 1:20, 28:18, 30:15, 34:19 ten [8] - 27:17, 28:11, 28:14, 30:3, 30:18, 30:25, 31:1, 31:2 terms [9] - 4:22, 4:25, 9:4, 10:22, 11:7, 16:21, 16:25, 44:11, 45:21 tethered [1] - 35:16 THE [49] - 1:1, 1:2, 3:1, 3:13, 3:25, 4:8, 5:23, 7:10, 8:7, 8:25, 9:14, 12:3, 12:14, 12:17, 12:20, 14:5, 14:20, 18:12, 20:6, 21:6, 23:17, 24:9, 25:7, 25:20, 26:10, 27:17, 28:9, 30:12, 31:23, 32:5, 34:2, 36:21, 37:8, 39:3, 40:5, 41:10, 42:5, 43:21, 46:7, 46:11, 48:17, 50:16, 52:4, 54:9, 55:2, 55:23, 56:20, 57:11, 57:25 theme [1] - 51:4 theories [1] - 11:7 theory [1] - 13:10 thereby [1] - 7:23 therefore [3] - 8:19, 23:7, 34:10 they've [8] - 11:22, 17:9, 29:13, 29:20, 30:2, 34:4, 44:5, 49:9 thinking [1] - 34:19 third [2] - 9:15, 15:9 three [4] - 11:6, 27:21, 35:23, 45:2 throughout [1] - 15:11 timely [2] - 44:15, 44:25 timing [1] - 44:8 today [11] - 3:2, 3:24, 4:9, 4:15, 5:6, 9:1, 13:4, 20:17, 47:24, 49:20, 57:5 tomorrow [1] - 40:21</p>	<p>ton [1] - 58:1 took [2] - 8:3, 17:11 top [1] - 31:21 topical [1] - 5:14 topics [2] - 27:21, 27:23 total [1] - 28:25 totalling [1] - 47:4 touched [1] - 46:13 transcript [2] - 59:11, 59:13 TRANSCRIPT [1] - 1:16 transfer [2] - 17:18, 29:17 trial [1] - 13:12 tried [1] - 23:3 true [1] - 59:14 truely [1] - 8:5 try [2] - 20:14, 33:3 trying [5] - 22:1, 40:7, 51:5, 51:10, 53:24 turn [6] - 18:13, 20:1, 20:8, 28:9, 31:12, 51:20 TWO [1] - 4:2 two [11] - 7:3, 20:15, 28:1, 29:14, 31:13, 31:15, 31:19, 31:20, 31:24, 34:12, 45:12 two-man [1] - 20:15 Tyler [1] - 3:19 TYLER [1] - 2:9 typed [1] - 59:12 typewritten [1] - 59:14</p>	<p>unique [2] - 44:2, 52:20 UNITED [1] - 1:1 universe [1] - 41:9 unlikely [1] - 31:3 unrelated [1] - 39:16 unsurprisingly [1] - 45:8 untenable [1] - 17:9 unwilling [1] - 29:20 up [5] - 8:3, 14:16, 37:13, 48:7, 48:13 update [1] - 12:6 updated [2] - 12:11, 12:17</p>
				V
				<p>valuation [1] - 24:20 version [2] - 12:15, 13:1 versus [3] - 3:4, 3:5, 51:3 via [1] - 1:19 view [3] - 6:7, 34:3, 46:25 virtually [3] - 13:18, 21:4, 38:23 volume [2] - 20:22, 51:22 vs [3] - 1:5, 1:11, 59:9</p>
				W
				<p>wait [2] - 38:4, 39:25 waive [1] - 8:4 waiving [1] - 8:1 wants [2] - 4:18, 58:4 warner [1] - 59:4 Warner [1] - 59:21 warranted [1] - 43:19 WATKINS [1] - 2:11 watkins [1] - 3:21 Watkins [1] - 4:21 website [1] - 47:13 week [12] - 9:22, 12:18, 39:23, 40:21, 41:17, 44:14, 45:3, 46:20, 46:21, 47:19, 50:8 weeks [1] - 45:2 whatsoever [3] - 13:19, 23:11, 52:12 wherein [1] - 7:22 willful [3] - 35:21, 36:14, 43:7 WILLIAM [1] - 2:5 William [1] - 3:12</p>

willing ^[1] - 26:25
Wilson ^[1] - 4:6
WILSON ^[1] - 2:19
window ^[6] - 15:21,
15:25, 16:19, 30:7,
43:11, 49:19
winning ^[1] - 45:9
Wisdom ^[1] - 16:9
withdraw ^[1] - 7:22
withheld ^[1] - 25:4
withholding ^[1] -
11:22
woefully ^[1] - 14:4
word ^[2] - 21:8, 37:16
worry ^[1] - 37:4
worse ^[1] - 39:11
writing ^[1] - 6:19

Y

year ^[6] - 5:5, 17:12,
29:15, 38:5, 49:17,
52:14
years ^[3] - 19:8, 19:13,
30:3
yesterday ^[1] - 36:8
YouTube ^[12] - 4:3,
5:24, 6:3, 6:5, 6:24,
24:11, 32:21, 33:8,
34:24, 35:2, 36:13,
37:7

Z

zero ^[1] - 49:9